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# TOPHAM'S
# REAL PROPERTY

*AN INTRODUCTORY EXPLANATION OF THE LAW RELATING TO LAND*

**THIRD EDITION**


BY

ALFRED F. TOPHAM, LL.M.

OF LINCOLN'S INN, BARRISTER-AT-LAW

READER IN THE LAW OF REAL PROPERTY AND CONVEYANCING TO THE COUNCIL OF LEGAL EDUCATION

FORMERLY WHEWELL SCHOLAR AND CHANCELLOR'S MEDALLIST IN THE UNIVERSITY OF CAMBRIDGE

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# PREFACE.

THE author feels that an apology is due to many students who have been kept waiting for this edition. The delay was due to the introduction in the House of Lords of the Law of Property Bill, which, if passed, will entirely change the law of Real Property.

As however the progress of the Bill has not been so rapid as was at first anticipated, this edition can no longer be delayed.

As stated in the preface to former editions, this book is intended primarily for students. So far as it deals with the law of the present day, the author believes that it covers the whole ground, at any rate in outline, and will probably be found sufficient in itself for the purposes of the Law Special at Cambridge and other similar examinations for which a knowledge of the principles of the modern law of Real Property is required.

The history of the law is dealt with in outline for the purpose of explaining some of the more intricate

of the modern rules, and a general view is given of the manner in which a contract for the sale of land is carried out and the conveyance completed. It is hoped, therefore, that to candidates for the more advanced examinations the book will be useful as a first explanation of a very intricate subject. With the same end in view full explanations have been inserted of the more difficult rules with frequent illustrations chiefly by way of cases actually decided.

A student who approaches the study of the law of land by reading at the outset such a standard work as Williams on Real Property is apt to get confused by the wealth of detail and the extraordinary complication and formality of the early law, and it is hoped that a previous study of this little book will place him in a position to understand and appreciate the true value of that most important branch of his studies.

It is perhaps hardly necessary to add that where practical conveyancing forms a substantial part of the knowledge to be acquired, as by candidates for call to the Bar, the course of study must be carried further than the general view of that subject here given, which, however, should considerably assist the student to master the intricacies of practice detailed

in Seaborne on Vendors and Purchasers and the other works on practical conveyancing, which he must study before he can be confident of success.

An important change in the law has been effected by the Wills (Soldiers and Sailors) Act, 1918, which extends to real property the provisions of sect. 11 of the Wills Act relating to the Wills of soldiers and sailors.

Some further cases of importance to the student relating to the law of land have been incorporated in this edition, and further authorities have been added for some of the propositions of law for which previously no authority was given.

The author is much indebted to his friend, Mr. H. S. Carlyon, of the Middle Temple, for his assistance in reading the proofs, and generally preparing this edition for the press.

A. F. TOPHAM.

5, NEW SQUARE, LINCOLN'S INN,
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# TABLE OF CONTENTS.


PAGE

TABLE OF STATUTES . . . . . xvii

LIST OF CASES . . . . . xxiii

CHAPTER I.

INTRODUCTION . . . . . 1

Section 1. Ownership of Land . . . . . 2

CHAPTER II.

Classification of Tenure . . . . . 9

*CORPOREAL HEREDITAMENTS.*

CHAPTER III.

Forms of Tenure.

Section 1. Socage Tenure . . . . . 12

Section 2. Military Tenure . . . . . 17

CHAPTER IV.

Tenant in Fee Simple.

Section 1. His Right to Alienate . . . . . 20

Section 2. Mode of granting a Fee Simple . . . 25

CHAPTER V.

Tenant in Tail.

Section 1. History of the effect of a Grant of Land by X to "A and the Heirs of his Body" . . 28

Section 2. Present Law . . . . . 33

Section 3. The Modern Settlement . . . . . 34

Section 4. General and Special Entails . . . . 35

## CHAPTER VI.

### TENANT FOR LIFE.


| | | PAGE |
|---|---|---|
| Section 1. | How a Life Estate is Created | 37 |
| Section 2. | Powers of a Life Tenant | 38 |
| Section 3. | Tenant *Pur autre vie* | 48 |


## CHAPTER VII.

### JOINT TENANTS AND TENANTS IN COMMON.


| | | |
|---|---|---|
| Section 1. | Nature of Joint Tenancy | 51 |
| Section 2. | Severance | 53 |
| Section 3. | Partition | 54 |


## CHAPTER VIII.


ACTIONS FOR THE RECOVERY OF LAND . . . . 56


## CHAPTER IX.

### EQUITABLE ESTATES.


| | | |
|---|---|---|
| Section 1. | Before the Statute of Uses | 59 |
| Section 2. | The Statute of Uses | 62 |
| Section 3. | Equitable Estates since the Statute of Uses | 65 |
| Section 4. | The Estate of the Trustee | 69 |
| Section 5. | Different Kinds of Trusts | 70 |


# *ALIENATION.*

## CHAPTER X.

### ALIENATION BY CONVEYANCE.


| | | |
|---|---|---|
| Section 1. | History of the Form of a Conveyance | 73 |
| Section 2. | Present Form of a Conveyance | 78 |


## CHAPTER XI.


ALIENATION ON DEATH . . . . . 80

## CHAPTER XII.

### INTESTACY.

PAGE

Section 1. Freeholds . . . . . 84
Section 2. Copyholds . . . . . 93
Section 3. Leaseholds . . . . . 93

## CHAPTER XIII.

### WILLS OF LAND.

Section 1. Rules affecting the Validity of the Will, or the Dispositions contained in the Will . . 96
Section 2. Rules as to Construction . . . . 103
Section 3. Life Estate by Implication . . . . 107

## CHAPTER XIV.

### ALIENATION FOR DEBT.

Section 1. Liability of Land during the Life of the Tenant 110
Section 2. On the Death of the Tenant . . . . 116

## CHAPTER XV.

DISABILITIES . . . . . 119

## CHAPTER XVI.

### MARRIED WOMEN.

Section 1. Rights of the Husband over the Property of the Wife during her Life . . . . . 122
Section 2. Rights of the Husband after the Death of the Wife . . . . . 126
Section 3. Rights of the Wife to the Property of her Husband . . . . . 129
Section 4. Present Effects of the Rule that "Husband and Wife are one in Law" . . . 132

## *INCORPOREAL HEREDITAMENTS.*

## CHAPTER XVII.

THE RULE AGAINST PERPETUITIES . . . . . 135

## CHAPTER XVIII.

PAGE
THE RULE AS TO ACCUMULATIONS . . . . . 140

## CHAPTER XIX.

CLASSIFICATION OF FUTURE ESTATES . . . . . 144

## CHAPTER XX.

REVERSIONS . . . . . 147

## CHAPTER XXI.

A VESTED REMAINDER . . . . . 149

## CHAPTER XXII.

CONTINGENT REMAINDERS . . . . . 154

## CHAPTER XXIII.

### EXECUTORY INTERESTS.

Section 1. Forms of Executory Interests . . . 161
Section 2. Powers of Appointment . . . . 163
Section 3. The Rule against Perpetuities as affecting Powers of Appointment . . . . 166
Section 4. Fraud on a Power . . . . . 168
Section 5. Defective Exercise of a Power . . . 169

## CHAPTER XXIV.

USES TO BAR DOWER . . . . . 170

## CHAPTER XXV.

### RIGHTS OVER LAND IN THE POSSESSION OF OTHERS.

Section 1. Nature of Incorporeal Hereditaments . . 173
Section 2. Rents . . . . . 175
Section 3. Easements and Profits . . . . . 177
Section 4. Advowsons . . . . . 179

## CHAPTER XXVI.

### COPYHOLDS.


| | | PAGE |
|---|---|---|
| Section 1. | History of Copyholds | 183 |
| Section 2. | Transfer of Copyholds | 184 |
| Section 3. | Estates in Copyholds | 184 |
| Section 4. | Enfranchisement of Copyholds | 188 |
| Section 5. | Death of a Copyhold Tenant | 190 |
| Section 6. | Contingent Remainders of Copyhold Lands | 192 |


## CHAPTER XXVII.

### LEASEHOLDS.


| | | |
|---|---|---|
| Section 1. | Forms of Leasehold Interests | 193 |
| Section 2. | Creation of Leases | 195 |
| Section 3. | Termination of Leases | 198 |
| Section 4. | Transfer of Leaseholds | 202 |
| Section 5. | Covenants which run with the Land | 204 |
| Section 6. | Succession to Leaseholds on Death | 208 |
| Section 7. | Long Terms of Years | 208 |


## CHAPTER XXVIII.


CHATTELS WHICH DESCEND AS LAND . . . . 217


## CHAPTER XXIX.

### MORTGAGES.


| | | |
|---|---|---|
| Section 1. | Form and Effect | 222 |
| Section 2. | Rights of the Mortgagee | 225 |
| Section 3. | Rights of the Mortgagor | 230 |
| Section 4. | Death of the Mortgagor | 234 |
| Section 5. | Death of the Mortgagee | 234 |
| Section 6. | Transfer of Rights | 236 |
| Section 7. | Sub-mortgages | 237 |
| Section 8. | Equitable Mortgages | 237 |
| Section 9. | Priorities | 238 |
| Section 10. | Consolidation | 241 |
| Section 11. | Mortgage of Leaseholds | 244 |
| Section 12. | Mortgage of Copyholds | 245 |

## CHAPTER XXX.

PAGE
LIMITATION . . . . . 246

## CHAPTER XXXI.

PRESCRIPTION . . . . . 252

## CHAPTER XXXII.

### CONTRACTS FOR THE SALE OF LAND.

Section 1. An Open Contract . . . . . 258
Section 2. Particulars and Conditions of Sale . . 267
Section 3. Sale by Private Contract . . . . 276
Section 4. The Abstract . . . . . 277
Section 5. Requisitions and Replies . . . . 279
Section 6. The Conveyance . . . . . 280

## CHAPTER XXXIII.

COVENANTS FOR TITLE . . . . . 283

## CHAPTER XXXIV.

### REGISTRATION.

Section 1. Registration of Incumbrances and Claims against Land . . . . . 287
Section 2. Registration of Deeds and other Documents . 289
Section 3. Registration of Title . . . . . 289

## CHAPTER XXXV.

DEATH DUTIES . . . . . 296

## CHAPTER XXXVI.

PRINCIPAL STATUTORY PROVISIONS RELATING TO REAL PROPERTY . . . . . 301

## CHAPTER XXXVII.

### FORMS OF DOCUMENTS.

PAGE

Form I. Mortgage of Freeholds . . . . . 325
Form II. Mortgage of Copyholds . . . . . 327
Form III. Mortgage of Leaseholds . . . . . 328
Form IV. Marriage Settlement of Real Estate . . 331

TEST QUESTIONS . . . . . 341

INDEX . . . . . [1]—[16]

# TABLE OF STATUTES.


| | | PAGE |
|---|---|---|
| 52 Henry III. c. 23. | Statute of Gloucester ... ... ... | 40 |
| 6 Edward I. c. 5. | Statute of Marlborough ... ... ... | 39 |
| 7 Edward I. c. 1. | ... ... ... ... ... ... | 22 |
| 13 Edward I. c. 1. | De Donis, 1285 ... ... ... 28, 187, 301 | |
| | s. 2 ... ... ... ... ... | 28 |
| 13 Edward I. c. 18. | ... ... ... ... ... ... | 110 |
| 13 Edward I. c. 32. | ... ... ... ... ... ... | 29 |
| 18 Edward I. c. 1. | Quia Emptores ... ... 13, 21, 163, 301 | |
| 15 Richard II. c. 5. | ... ... ... ... ... | 22, 61 |
| 27 Hen. VIII. c. 10. | Statute of Uses, 1536 .. 21, 62, 65, 66, 71, 75, 76, 103, 130, 131, 146, 162, 165, 170, 171, 197, 301 | |
| | s. 1 ... ... ... ... ... | 63 |
| | s. 9 ... ... ... ... ... | 131 |
| 27 Hen. VIII. c. 16. | Statute of Enrolments, 1536 ... | 75, 76 |
| 32 Hen. VIII. c. 1. | Statute of Wills ... ... ... 21, 105, 163 | |
| 32 Hen. VIII. c. 34. | ... ... ... ... ... ... | 205 |
| 13 Elizabeth, c. 5. | ... ... ... ... ... | 115, 116 |
| 27 Elizabeth, c. 4. | ... ... ... ... ... | 115, 116 |
| 21 Jac. I. c. 16. | Statute of Limitations, 1623 .. 230, 233, 247, 251 | |
| 12 Car. II. c. 24. | Statute of Tenures ... ... 10, 18, 21 | |
| 29 Car. II. c. 3. | Statute of Frauds, 1677 . . 67, 97, 100, 273, 301 | |
| | s. 1 ... ... ... ... | 76, 195 |
| | s. 2 ... ... ... ... | 76, 195 |
| | s. 3 ... ... ... ... ... | 76 |
| | s. 4 ... ... ... ... 77, 197, 258 | |
| | ss. 7, 9 ... ... ... ... ... | 76 |
| | s. 12 ... ... ... ... ... | 49 |
| 4 & 5 Anne, c. 3. | s. 19 ... ... ... ... ... | 249 |
| 4 & 5 Anne, c. 16. | ... ... ... ... ... | 148 |
| | s. 27 ... ... ... ... ... | 52 |
| 7 Anne, c. 20. | Middlesex Registry Act, 1708— | |
| | s. 1 ... ... ... ... ... | 289 |
| | s. 8 ... ... ... ... ... | 289 |
| 13 Geo. II. c. 29. | ... ... ... ... ... ... | 23 |
| 25 Geo. II. c. 6. | ... ... ... ... ... ... | 100 |
| 14 Geo. III. c. 78. | Fires Prevention (Metropolis) Act, 1774— | |
| | s. 83 ... ... ... ... ... | 214 |
| 39 & 40 Geo. III. c. 98. | Thellusson Act, 1800 ... ... 140, 303 | |
| 47 Geo III. c. 74. | ... ... ... ... ... ... | 117 |
| 9 Geo. IV. c. 94. | Clergy Resignation Bond Act, 1828 ... | 181 |
| 11 Geo. IV. & 1 Will. IV. c. 46. | Illusory Appointments Act, 1830 ... | 164 |
| | s. 1 ... ... ... ... ... | 164 |
| 11 Geo. IV. & 1 Will. IV. c. 65. | Infants' Property Act, 1830— | |
| | s. 9 ... ... ... ... ... | 192 |
| 2 & 3 Will. IV. c. 71. | Prescription Act, 1832 ... ... 253, 303 | |
| | s. 1 ... ... ... ... ... | 253 |
| | ss. 2, 3 ... ... ... ... ... | 254 |

| | | PAGE |
|---|---|---|
| 2 & 3 Will. IV. c. 71. | Prescription Act, 1832— | |
| | s. 7 ... ... ... ... ... | 255 |
| | s. 8 ... ... ... ... ... | 255 |
| 3 & 4 Will. IV. c. 27. | Real Property Limitation Act, 1833 .. | 246, 248 |
| | s. 7 ... ... ... ... ... | 249 |
| | s. 9 ... ... ... ... ... | 249 |
| | s. 28 ... ... ... ... ... | 230 |
| | s. 34 ... ... ... ... ... | 246 |
| 3 & 4 Will. IV. c. 74. | Fines and Recoveries Act, 1833 .. | 32, 122, 187, 305 |
| 3 & 4 Will. IV. c. 104. | Administration of Estates Act, 1833 ... | 117 |
| 3 & 4 Will. IV. c. 105. | Dower Act, 1833 ... | 131, 132, 172, 191, 306 |
| | s. 2 ... ... ... ... ... | 132 |
| | s. 3 ... ... ... ... ... | 132 |
| | s. 4 ... ... ... ... ... | 132 |
| | s. 6 ... ... ... ... ... | 131 |
| | s. 8 ... ... ... ... ... | 131 |
| 3 & 4 Will. IV. c. 106. | Inheritance Act, 1833 ... ... | 84, 89, 93 |
| | s. 2 ... ... ... ... ... | 89 |
| | s. 6 ... ... ... ... ... | 90 |
| | s. 8 ... ... ... ... ... | 90 |
| | s. 9 ... ... ... ... ... | 90 |
| 7 Will. IV. & 1 Vict. c. 26. | Wills Act, 1837 ... ... | 21, 96, 306 |
| | s. 6 ... ... ... ... ... | 49 |
| | s. 9 ... ... ... ... ... | 96 |
| | s. 11 ... ... ... ... ... | 97 |
| | s. 15 ... ... ... ... ... | 100 |
| | s. 18 ... ... ... ... ... | 98 |
| | s. 20 ... ... ... ... ... | 98 |
| | s. 22 ... ... ... ... ... | 99 |
| | s. 24 ... ... ... ... ... | 104 |
| | s. 26 ... ... ... ... ... | 104 |
| | s. 27 ... ... ... ... ... | 105 |
| | s. 28 ... ... ... ... | 38, 104 |
| | s. 29 ... ... ... ... ... | 106 |
| | s. 32 ... ... ... ... ... | 101 |
| | s. 33 ... ... ... ... | 101, 102 |
| 1 & 2 Vict. c. 110. | Judgments Act, 1838 ... ... | 110, 111 |
| 4 & 5 Vict. c. 21. | ... ... ... ... ... ... | 77 |
| 8 & 9 Vict. c. 106. | Real Property Act, 1845... | 77, 146, 157, 192, 308 |
| | s. 3 ... ... ... ... ... | 195 |
| | s. 8 ... ... ... ... ... | 157 |
| 8 & 9 Vict. c. 112. | Satisfied Terms Act, 1845 | 209, 211, 309 |
| 14 & 15 Vict. c. 25. | Landlord and Tenant Act, 1851 ... | 39 |
| 15 & 16 Vict. c. 24. | Wills Act Amendment Act, 1852 ... | 96 |
| 15 & 16 Vict. c. 76. | Common Law Procedure Act, 1852 ... | 200 |
| | ss. 168, 169 ... ... ... ... | 58 |
| 16 & 17 Vict. c. 51. | Succession Duty Act, 1853 ... ... | 297 |
| 17 & 18 Vict. c. 113. | Locke King's Act, 1854 ... ... ... | 234 |
| 18 & 19 Vict. c. 43. | Infant Settlements Act, 1855 ... ... | 120 |
| 22 & 23 Vict. c. 35. | Lord St. Leonard's Act, 1859— | |
| | s. 3 ... ... ... ... ... | 207 |
| | s. 14 ... ... ... ... ... | 80 |
| | s. 19 ... ... ... ... ... | 90 |
| | s. 27 ... ... ... ... ... | 208 |
| 23 & 24 Vict. c. 145. | Lord Cranworth's Act, 1860 ... ... | 228 |

| | | PAGE |
|---|---|---|
| 27 & 28 Vict. c. 112. | Judgments Act, 1864 ... ... ... | 111 |
| 27 & 28 Vict. c. 114. | Improvement of Land Act, 1864 ... | 288 |
| 30 & 31 Vict. c. 69. | Real Estate Charges Act, 1867 ... ... | 234 |
| 31 & 32 Vict. c. 40. | Partition Act, 1868 ... ... ... | 55 |
| 32 & 33 Vict. c. 46. | Hinde Palmer's Act, 1869 ... ... | 309 |
| | s. 1 ... ... ... ... ... | 118 |
| 33 & 34 Vict. c. 23. | Forfeiture Act, 1870 ... ... ... | 15 |
| 33 & 34 Vict. c. 93. | Married Women's Property Act, 1870 .. | 122, 124 |
| 34 & 35 Vict. c. 79. | Lodger's Goods Protection Act, 1871 ... | 176 |
| 36 & 37 Vict. c. 66. | Judicature Act, 1873 ... ... | 8, 40, 41, 58 |
| | s. 25 (4) ... ... ... ... | 150 |
| 37 & 38 Vict. c. 37. | Powers of Appointment Act, 1874 ... | 164 |
| 37 & 38 Vict. c. 57. | Real Property Limitation Act, 1874 .. | 246, 310 |
| | s. 1 ... ... ... ... ... | 246 |
| | s. 2 ... ... ... ... ... | 249 |
| | ss. 3, 5 ... ... ... ... ... | 248 |
| | s. 4 ... ... ... ... ... | 249 |
| | s. 6 ... ... ... ... ... | 250 |
| | ss. 7, 8 ... ... ... ... ... | 230 |
| 37 & 38 Vict. c. 78. | Vendor and Purchaser Act, 1874 .. | 125, 258, 260 |
| | s. 2 ... ... ... ... ... | 262 |
| 38 & 39 Vict. c. 87. | Land Transfer Act, 1875 ... ... | 289, 290 |
| | ss. 7, 30 ... ... ... ... ... | 292 |
| 40 & 41 Vict. c. 33. | Contingent Remainders Act, 1877 .. | 159, 192, 310 |
| 40 & 41 Vict. c. 34. | Locke King's Amendment Act, 1877 ... | 234 |
| 44 & 45 Vict. c. 41. | Conveyancing and Law of Property Act, | |
| | 1881 ... ... ... | 38, 258, 310 |
| | s. 3 (2) ... ... ... ... | 189, 262 |
| | (3) ... ... ... ... ... | 261 |
| | (6) ... ... ... ... ... | 264 |
| | s. 6 ... ... ... ... | 78, 177 |
| | s. 7 ... ... ... ... | 284, 286 |
| | s. 9 ... ... ... ... ... | 266 |
| | s. 14 ... ... ... ... ... | 201 |
| | (2) ... ... ... ... ... | 201 |
| | s. 17 ... ... ... ... ... | 242 |
| | s. 18 ... ... ... ... ... | 233 |
| | s. 19 ... ... ... ... ... | 228 |
| | (1) (iii) ... ... ... ... | 228 |
| | s. 20 ... ... ... ... ... | 228 |
| | s. 21 (3) ... ... ... ... | 227 |
| | s. 30 ... ... ... ... | 191, 235 |
| | s. 44 ... ... ... | 176, 332, 333 |
| | s. 49 (1) ... ... ... ... ... | 78 |
| | s. 50 ... ... ... ... ... | 61 |
| | s. 51 ... ... ... ... | 25, 27, 78 |
| | s. 52 ... ... ... ... ... | 166 |
| | s. 54 ... ... ... ... ... | 282 |
| | s. 61 ... ... ... ... ... | 235 |
| | s. 62 ... ... ... ... ... | 177 |
| | s. 65 ... ... ... ... ... | 212 |
| 45 & 46 Vict. c. 38. | Settled Land Act, 1882 ... ... | 39, 41, 42 |
| | s. 3 (iii) ... ... ... ... ... | 43 |
| | s. 6 ... ... ... ... ... | 45 |
| | s. 7 (i) ... ... ... ... ... | 43 |
| | s. 21 (iv) ... ... ... ... | 43 |
| | s. 25, 26 ... ... ... ... | 45 |

| | | PAGE |
|---|---|---|
| 45 & 46 Vict. c. 38. | Settled Land Act, 1882— | |
| | s. 35 ... ... ... ... ... | 47 |
| | s. 58 (1) (viii) ... ... ... ... | 128 |
| | ss. 59, 60 ... ... ... ... | 121 |
| 45 & 46 Vict. c. 39. | Conveyancing Act, 1882 ... ... ... | 320 |
| | s. 3 ... ... ... ... ... | 69 |
| | s. 10 ... ... ... ... ... | 107 |
| 45 & 46 Vict. c. 75. | Married Women's Property Act, 1882 . . 125, 126, 128, 132, 320 | |
| | s. 1 ... ... ... ... ... | 125 |
| | s. 19 ... ... ... ... ... | 126 |
| 46 & 47 Vict. c. 52. | Bankruptcy Act, 1883— | |
| | s. 4 ... ... ... ... ... | 113 |
| | s. 6 ... ... ... ... ... | 112 |
| | s. 47 ... ... ... ... ... | 114 |
| | s. 146 ... ... ... ... ... | 111 |
| 46 & 47 Vict. c. 61. | Agricultural Holdings (England) Act, 1883— | |
| | s. 33 ... ... ... ... ... | 194 |
| 47 & 48 Vict. c. 54. | Yorkshire Registry Act, 1884— | |
| | s. 14 ... ... ... ... ... | 289 |
| 47 & 48 Vict. c. 71. | Intestates' Estates Act, 1884— | |
| | s. 4 ... ... ... ... ... | 68 |
| 50 & 51 Vict. c. 73. | Copyhold Act, 1887— | |
| | s. 45 ... ... ... ... ... | 191 |
| 51 & 52 Vict. c. 8. | Customs and Inland Revenue Act, 1888 | 270 |
| 51 & 52 Vict. c. 42. | Mortmain and Charitable Uses Act, 1888 ... ... ... ... | 61, 321 |
| | s. 1 ... ... ... ... | 22, 23 |
| | s. 4 ... ... ... ... ... | 24 |
| | s. 7 ... ... ... ... ... | 24 |
| 51 & 52 Vict. c. 51. | Land Charges Registration and Searches Act, 1888— | |
| | ss. 5, 6 ... ... ... ... ... | 111 |
| 53 & 54 Vict. c. 29. | Intestates' Estates Act, 1890 ... | 91, 132 |
| 53 & 54 Vict. c. 69. | Settled Land Act, 1890 ... ... ... | 42 |
| | s. 7 ... ... ... ... ... | 43 |
| | s. 10 ... ... ... ... ... | 42 |
| | s. 13 ... ... ... ... ... | 45 |
| | s. 35 ... ... ... ... ... | 47 |
| 54 & 55 Vict. c. 73. | Mortmain and Charitable Uses Act, 1891 . . | 22, 25 |
| 55 & 56 Vict. c. 13. | Conveyancing and Law of Property Act, 1892— | |
| | s. 2 (2) ... ... ... ... ... | 201 |
| | s. 3 ... ... ... ... ... | 201 |
| | s. 4 ... ... ... ... ... | 201 |
| 55 & 56 Vict. c. 58. | Accumulations Act, 1892 ... ... | 141 |
| 56 & 57 Vict. c. 21. | Voluntary Conveyances Act, 1893— | |
| | s. 2 ... ... ... ... ... | 116 |
| 56 & 57 Vict. c. 53. | Trustee Act, 1893— | |
| | s. 10 ... ... ... ... ... | 70 |
| 56 & 57 Vict. c. 63. | Married Women's Property Act, 1893 ... | 321 |
| 57 & 58 Vict. c. 30. | Finance Act, 1894 ... ... ... | 296 |
| | s. 18 ... ... ... ... ... | 297 |
| | s. 24 ... ... ... ... ... | 297 |
| 57 & 58 Vict. c. 46. | Copyhold Act, 1894 ... ... ... | 188 |
| | s. 8 ... ... ... ... ... | 189 |

| | | PAGE |
|---|---|---|
| 57 & 58 Victo. 46 | Copyhold Act, 1894— | |
| | s. 10 ... ... ... ... ... | 189 |
| | s. 21 (1) ... ... ... ... ... | 189 |
| | (*d*) ... ... ... ... | 189 |
| | (2) ... ... ... ... ... | 189 |
| | s. 22 ... ... ... ... ... | 190 |
| | s. 23 ... ... ... ... ... | 190 |
| | s. 88 ... ... ... ... ... | 191 |
| 60 & 61 Vict. c. 65. | Land Transfer Act, 1897... | 48, 50, 79, 81, 118, 160, 190, 289, 290, 299, 322 |
| | s. 1 ... ... ... ... ... | 81 |
| | (2) ... ... ... ... ... | 82 |
| | (3) ... ... ... ... ... | 83 |
| | (4) ... ... ... ... ... | 82 |
| | s. 3 ... ... ... ... ... | 82 |
| | s. 16 (2) ... ... ... ... ... | 294 |
| | s. 24 ... ... ... ... ... | 293 |
| 61 & 62 Vict. c. 48. | Benefices Act, 1898 ... ... ... | 181 |
| | s. 1 (1) (*a*) ... ... ... ... | 181 |
| | (*b*) ... ... ... ... | 181 |
| | (2) ... ... ... ... ... | 182 |
| | (3) ... ... ... ... ... | 181 |
| | s. 2 (1) (*a*) ... ... ... ... | 181 |
| | s. 12 ... ... ... ... ... | 181 |
| 63 & 64 Vict. c. 26. | Land Charges Act, 1900 ... ... | 111, 287 |
| 7 Edward VII. c. 13. | Finance Act, 1907 ... ... ... | 296 |
| 7 Edward VII. c. 18. | Married Women's Property Act, 1907 .. | 125, 324 |
| 8 Edward VII. c. 28. | Agricultural Holdings Act, 1908 | 194, 202 |
| | s. 1 (1) ... ... ... ... ... | 220 |
| | s. 2 ... ... ... ... ... | 221 |
| | ss. 10, 11, 21 ... ... ... ... | 220 |
| | Sched. I. ... ... ... ... | 221 |
| 8 Edward VII. c. 69. | Companies (Consolidation) Act, 1908— | |
| | s. 16 ... ... ... ... ... | 23 |
| 10 Edward VII. c. 8. | Finance (1909–10) Act, 1910 ... | 296, 297 |
| | s. 58 (2) ... ... ... ... ... | 298 |
| 8 & 9 Geo. V. c. 54. | Tithe Act, 1918 ... ... ... ... | 182 |

# LIST OF CASES.

## A.


PAGE

Ackroyd *v.* Smithson (1780), 1 Bro. C. C. 503; 1 Wh. & T. 68; 3 P. Wms. 22 n. ... ... ... ... ... ... ... 71, 102
Acton *v.* White (1823), 1 Sim. & St. 429 ... ... ... ... ... 124
Adams, Smith *v.* (1854), 5 D. M. & G. 712 ... ... ... ... 191
Adney *v.* Field (1767), Amb. 654 ... ... ... ... ... ... 169
Amphlett, Collis *v.*, [1917] W. N. 291; 62 Sol. Jo. 37 ... ... ... 78
Andrews *v.* Waite, [1907] 2 Ch. 500; 76 L. J. Ch. 676; 97 L. T. 428 255
Anthony *v.* Anthony, [1893] 3 Ch. 498; 62 L. J. Ch. 1004; 69 L. T. 300; 41 W. R. 667 ... ... ... ... ... ... ... 111
Armitstead, Huffel *v.* (1835), 7 C. & P. 56 ... ... ... ... 194
Armstrong, Tullett *v.* (1838), 1 Beav. 1 ... ... ... ... ... 124
Ascherberg, Stockdale *v.*, [1904] 1 K. B. 447; 73 L. J. K. B. 206; 90 L. T. 111 ... ... ... ... ... ... ... ... 214
Ashburton (Lord) *v.* Nocton, [1915] 1 Ch. 274; 84 L. J. Ch. 193; 111 L. T. 895; 31 T. L. R. 122; 59 Sol. Jo. 145 ... ... ... 111
Asher *v.* Whitlock (1865), L. R. 1 Q. B. 1 ... ... ... ... 247
Ashforth, *In re*, Sibley *v.* Ashforth, [1905] 1 Ch. 535; 74 L. J. Ch. 361; 92 L. T. 534; 53 W. R. 328 ... ... ... 156, 157
Asplen *v.* Pullin, [1916] W. N. 400 ... ... ... ... ... 182
Atkinson, *In re*, [1908] 2 Ch. 307; 77 L. J. Ch. 766; 99 L. T. 174 .. 117, 118
———, *Re*, [1915] W. N. 388 ... ... ... ... ... ... 218
Attkins, *Re*, [1913] 2 Ch. 619; 109 L. T. 155; 57 Sol. Jo. 785 ... 150
Austerberry *v.* Corporation of Oldham (1885), 29 Ch. D. 750; 55 L. J. Ch. 633; 53 L. T. 543; 33 W. R. 807 ... ... ... ... 207


## B.


Baggett *v.* Meux (1844), 1 Coll. 138; affirmed (1846), 1 Ph. 627 ... 124
Bagley, Compton *v.*, [1892] 1 Ch. 313; 61 L. J. Ch. 113; 65 L. T. 706 267
Bain *v.* Fothergill (1874), L. R. 7 H. L. 158 ... ... ... ... 261
Baker *v.* Holtpzaffell (1811), 4 Taunt. 45 ... ... ... ... 214
———. Lewis *v.*, [1905] 1 Ch. 46; 74 L. J. Ch. 39; 91 L. T. 744; 21 T. L. R. 17 ... ... ... ... ... ... ... 197
——— *v.* White (1875), L. R. 20 Eq. 166; 44 L. J. Ch. 651; 33 L. T. 347; 23 W. R. 670 ... ... ... ... ... ... ... 65
Bankes, *Re*, [1902] 2 Ch. 333; 71 L. J. Ch. 708; 87 L. T. 432; 50 W. R. 663 ... ... ... ... ... ... ... ... 124
Barnard (Lord), Vane *v.* (1716), 3 Vern. 738 ... ... ... ... 40
Barnett, *In re*, [1908] W. N. 28 ... ... ... ... ... 169
Barrington *v.* Liddell (1852), 2 De G. M. & G. 480 ... ... ... 142
Bateman *v.* Hotchkin (1847), 10 Beav. 426 ... ... ... ... 138
Bates *v.* Donaldson, [1896] 2 Q. B. 241; 65 L. J. Q. B. 578; 74 L. T. 741 ... ... ... ... ... ... ... ... ... 215
Bayley-Worthington, *In re*, [1908] 1 Ch. 26; affirmed, [1908] A. C. 97 33

PAGE

Bellingham, Holmes *v.* (1859), 7 C. B. N. S. 329; 29 L. J. C. P. 132; 6 Jur. N. S. 534 ... ... ... ... ... ... ... 78
Blandy Jenkins' Estate, *Re*, Blandy Jenkins *v.* Walker, [1917] 1 Ch. 46; 86 L. J. Ch. 76; 115 L. T. 483 ... ... ... ... ... 33
Bleakley *v.* Smith (1840), 11 Sim. 150 ... ... ... ... ... 259
Bolton *v.* London School Board (1878), 7 Ch. D. 766; 47 L. J. Ch. 461; 26 W. R. 549 ... ... ... ... ... ... ... ... 264
Bonnewell *v.* Jenkins (1876), 8 Ch. D. 70; 47 L. J. Ch. 758; 38 L. T. 81; 26 W. R. 294 ... ... ... ... ... ... ... ... 259
Bowman *v.* Hyland (1876), 8 Ch. D. 588; 47 L. J. Ch. 581; 39 L. T. 90; 26 W. R. 876 ... ... ... ... ... ... ... 275
Bown, *Re* (1884), 27 Ch. D. 412; 53 L. J. Ch. 881 ... ... ... 124
Brace *v.* Duchess of Marlborough (1728), 2 P. Wms. 490 ... ... 241
Bradley, Carritt *v.*, [1903] A. C. 253; 72 L. J. K. B. 471; 88 L. T. 633 231, 232
Branker, Cunliffe *v.* (1876), 3 Ch. D. 393 ... ... ... ... 103, 158
Briggs, Laird *v.* (1881), 19 Ch. D. 22 ... ... ... ... ... 256
Britannia Building Society, Hughes *v.*, [1906] 2 Ch. 607; 75 L. J. Ch. 739; 95 L. T. 327 ... ... ... ... ... ... ... 243
Brown *v.* Raindle (1796), 3 Ves. Jun. 256 ... ... ... ... 53
Brudenell *v.* Elwes (1801), 1 East, 442 ... ... ... ... ... 156
Bryant, Cable *v.*, [1908] 1 Ch. 259 ... ... ... ... ... 177
Buckle *v.* Mitchell (1812), 18 Ves. 100 ... ... ... ... ... 115
Budd-Scott *v.* Daniell, [1902] 2 K. B. 351 ... ... ... ... 286
Bulteel, Pearce *v.*, [1916] 2 Ch. 544; 85 L. J. Ch. 677; 115 L. T. 291 115
Burgess *v.* Wheate (1759), 1 Eden, 177 ... ... ... ... ... 68
Burrows, Wheeldon *v.* (1879), 12 Ch. D., p. 31 ... ... ... ... 179
Butler and Baker's Case (1591), 3 Co. Rep. 30; 1 And. 348; Poph. 87; 3 Leon 271; Moore, K. B. 254 ... ... ... ... ... 124

## C.

Cable *v.* Bryant, [1908] 1 Ch. 259 ... ... ... ... ... 177
Cadell *v.* Palmer (1833), 7 Bli. N. S. 202 ... ... ... ... ... 135
Calcraft *v.* Roebuck (1790), 1 Ves. Jun. 221 ... ... ... ... 263
Capital and Counties Bank *v.* Rhodes, [1903] 1 Ch. 631; 72 L. J. Ch. 336; 88 L. T. 255 ... ... ... ... ... ... 150, 294
Carritt *v.* Bradley, [1903] A. C. 253; 72 L. J. K. B. 471; 88 L. T. 633 231, 232
Carter, Parker *v.* (1844), 4 Hare 400 ... ... ... ... ... 127
Casborne *v.* Scarfe (1737), 1 Atk. 603 ... ... ... ... ... 234
Cattell, *In re*, [1907] 1 Ch. 567; 76 L. J. Ch. 242; 96 L. T. 612; 23 T. L. R. 331; affirmed, [1914] 1 Ch. 177; 83 L. J. Ch. 322; 110 L. T. 137; 58 Sol. Jo. 67 ... ... ... ... ... 141
Central London Railway *v.* City of London Land Tax Commissioners, [1911] 1 Ch. 467; 80 L. J. Ch. 348; 104 L. T. 245; 75 J. P. 292; 27 T. L. R. 296; 9 L. G. R. 580 ... ... ... ... ... 78
Chapman and Hobbs, *In re* (1885), 29 Ch. D. 1007; 54 L. J. Ch. 810; 52 L. T. 805 ... ... ... ... ... ... ... ... 212
Chaytor, *In re*, [1900] 2 Ch. 804; 69 L. J. Ch. 837; 49 W. R. 125 ... 44
Cheese *v.* Lovejoy (1877), 2 P. D. 251; 37 L. T. 294; 25 W. R. 453 99
Cheetham, Leeds *v.* (1827), 1 Sim. 146 ... ... ... ... ... 214
Chenoweth, *In re*, Ward *v.* Develley, [1902] 2 Ch. 488; 71 L. J. Ch. 739; 86 L. T. 890; 50 W. R. 663 ... ... ... ... ... 16
Chichester Constable, Sissons *v.*, [1916] 2 Ch. 75; 85 L. J. Ch. 489; 114 L. T. 1163; 60 Sol. Jo. 605 ... ... ... ... ... 184

PAGE
Chrimes, *Re*, [1917] 1 Ch. 30; 86 L. J. Ch. 217; 115 L. T. 706; 61 Sol. Jo. 56 ... ... ... ... ... ... ... 124
City of London Brewery, White *v.* (1889), 42 Ch. D. 237 ... ... 226
City of London Land Tax Commissioners, Central London Railway *v.*, [1911] 1 Ch. 467; 80 L. J. Ch. 348; 104 L. T. 245; 75 J. P. 292; 27 T. L. R. 296; 9 L. G. R. 580 ... ... ... ... ... 78
Clark, Johnson *v.*, [1908] 1 Ch. 303 ... ... ... ... ... 123
Clarke's Settlement, *Re*, [1916] 1 Ch. 467; 85 L. J. Ch. 592; 114 L. T. 501 ... ... ... ... ... ... ... ... ... 155
Clegg *v.* Hands (1890), 44 Ch. D. 503; 59 L. J. Ch. 477; 62 L. T. 502; 38 W. R. 433 ... ... ... ... ... ... ... 205
Collis *v.* Amphlett, [1917] W. N. 291; 62 Sol. Jo. 37 ... ... ... 78
Colls, Home and Colonial Stores *v.*, [1904] A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687 ... ... ... ... ... ... ... 255
Compton *v.* Bagley, [1892] 1 Ch. 313; 61 L. J. Ch. 113; 65 L. T. 706 267
Cooke, Idle *v.* (1703), 2 Ld. Raym. 1151 ... ... ... ... ... 104
Copestake *v.* Hoper, [1907] 1 Ch. 366; C. A. [1908] 2 Ch. 10; 76 L. J. Ch. 232; 96 L. T. 322 ... ... ... ... ... ... 186
Corporation of Oldham, Austerberry *v.* (1885), 29 Ch. D. 750 ... ... 207
Coventry, Swansborough *v.* (1832), 9 Bing. 305 ... ... ... ... 178
Cuffe, *In re*, [1908] 2 Ch. 500 ... ... ... ... ... ... 91
Cunliffe *v.* Branker (1876), 3 Ch. D. 393; 46 L. J. Ch. 128 ... 103, 158
Currey, *Re* (1886), 32 Ch. D. 361; 55 L. J. Ch. 906; 54 L. T. 665; 34 W. R. 541 ... ... ... ... ... ... ... ... 124

## D.

Daniell, Budd-Scott *v.*, [1902] 2 K. B. 351 ... ... ... ... 286
Darby, Right *v.* (1786), 1 T. R. 159 ... ... ... ... ... 195
Dashwood *v.* Magniac, [1891] 3 Ch. 306 ... ... ... ... ... 47
David *v.* Sabin, [1893] 1 Ch. 523; 62 L. J. Ch. 347; 68 L. T. 237 ... 285
Dering, Monypenny *v.* (1852), 2 De G. M. & G. 170 ... ... ... 155
Derry *v.* Sanders, [1919] 1 K. B. 223; 88 L. J. K. B. 410; 120 L. T. 194; 35 T. L. R. 105; 63 Sol. Jo. 115 ... ... ... ... 189
De Teissier's S. E., *In re*, [1893] 1 Ch. 153; 62 L. J. Ch. 552; 68 L. T. 275; 41 W. R. 186 ... ... ... ... ... ... ... 46
Develley, Ward *v.*, [1902] 2 Ch. 488; 71 L. J. Ch. 739; 86 L. T. 890; 50 W. R. 663 ... ... ... ... ... ... ... ... 16
Dewar *v.* Goodman, [1908] 1 K. B. 94 ... ... ... ... ... 204
——— *v.* Mintoft, [1912] 2 K. B. 373; 81 L. J. K. B. 885; 106 L. T. 763; 28 T. L. R. 324 ... ... ... ... ... ... ... 274
D'Eyncourt *v.* Gregory (1876), 3 Ch. D. 635; 45 L. J. Ch. 741; 25 W. R. 6 ... ... ... ... ... ... ... ... ... 47
Dixon *v.* Solicitor to the Treasury, [1905] P. 42; 74 L. J. P. 33; 92 L. T. 427 ... ... ... ... ... ... ... ... 99
Doe d. Davy *v.* Oxenham (1840), 7 M. & W. 131 ... ... ... 249
——— Ellerbrook *v.* Flynn (1834), 1 C. M. & R. 137 ... ... ... 201
——— Strode *v.* Seaton (1835), 2 Cr. M. & R. 728 ... ... 58, 198
——— Wilson *v.* Phillips (1824), 2 Bing. 13 ... ... ... ... 199
Donaldson, Bates *v.*, [1896] 2 Q. B. 241; 65 L. J. Q. B. 578; 74 L. T. 751 ... ... ... ... ... ... ... ... ... 215
Dowset *v.* Sweet (1753), Ambler, 175 ... ... ... ... ... 104
Duchess of Marlborough, Brace *v.* (1728), 2 P. Wms. 490 ... ... 241
Duke of Marlborough *v.* Godolphin (1759), 1 Eden, 415 ... ... 155
Duthy and Jesson's Contract, *Re*, [1898] 1 Ch. 419 ... ... ... 264

## E.

PAGE

Eager *v.* Furnival (1881), 17 Ch. D. 115 ; 50 L. J. Ch. 537 ; 44 L. T. 464 ; 29 W. R. 649 ... ... ... ... ... ... 101, 127
Eardley *v.* Granville (1876), 3 Ch. D. 826 ; 49 L. J. Ch. 669 ; 34 L. T. 609 ... ... ... ... ... ... ... ... ... 186
Ecclesiastical Commissioners *v.* Upjohn, [1913] 1 K. B. 501 ; 82 L. J. K. B. 435 ; 108 L. T. 417 ... ... ... ... ... 182
Edwards *v.* Tuck (1853), 3 De G. M. & G. 40 ... ... ... ... 142
Elliott, *Re*, [1918] 2 Ch. 150 ; 87 L. J. Ch. 449 ; 118 L. T. 675 ; 62 Sol. Jo. 383 ... ... ... ... ... ... ... ... 142
Elwes, Brudenell *v.* (1801), 1 East, 442 ... ... ... ... ... 156
——— *v.* Maw (1802), 3 East, 38 ... ... ... ... ... ... 220
Engel *v.* Fitch (1869), L. R. 4 Q. B. 659 ; 38 L. J. Q. B. 304 ; 17 W. R. 894 ... ... ... ... ... ... ... ... ... 261
Ethel and Mitchell's Contract, *In re*, [1901] 1 Ch. 945 ; 70 L. J. Ch. 498 ; 84 L. T. 459 ... ... ... ... ... ... ... 26
Eyre, *In re*, [1883] W. N. 153 ; 49 L. T. N. S. 259 ... ... ... 166

## F.

Fanshawe, Howard *v.*, [1895] 2 Ch. 581 ; 64 L. J. Ch. 666 ; 73 L. T. 77 200
Faulds *v.* Jackson (1845), 6 N. of C. Supp. 1 ... ... ... ... 97
Fear, Morgan *v.*, [1907] A. C. 425 ; 76 L. J. Ch. 660 ... ... ... 256
Field, Adney *v.* (1767), Amb. 654 ... ... ... ... ... 169
Fitch, Engel *v.* (1869), L. R. 4 Q. B. 659... ... ... ... ... 261
Fletcher, *Re*, [1917] 1 Ch. 339 ; 86 L. J Ch. 317 ; 116 L. T. 460 ; 61 Sol. Jo. 267 ... ... ... ... ... ... ... ... 150
Flower *v.* Hartopp (1843), 6 Beav. 476 ... ... ... ... ... 274
Flynn, Doe d. Ellerbrook *v.* (1834), 1 C. M. & R. 137 ... ... ... 201
Fothergill, Bain *v.* (1874), L. R. 7 H. L. 158 ... ... ... ... 261
Foxwell, Van Grutten *v.*, [1897] A. C. 658 ; 66 L. J. Q. B. 745 ; 77 L. T. 170 ... ... ... ... ... ... ... ... 151
Frost, *In re* (1890), 43 Ch. D. 253 ; 39 L. J. Ch. 808 ; 23 L. T. 233 ; 18 W. R. 986 ... ... ... ... ... ... ... ... 157
Furnival, Eager *v.* (1881), 17 Ch. D. 115 ... ... ... 101, 127

## G.

Gaddes, Kilgour *v.*, [1904] 1 K. B. 457 ... ... ... ... ... 256
Garner *v.* Wingrove, [1905] 2 Ch. 233 ; 74 L. J. Ch. 545 ; 93 L. T. 131 249
Garrett, Moule *v.* (1870), L. R. 5 Exch. 132 ; 39 L. J. Ex. 62 ; 26 T. L. R. 367 ; 20 W. R. 416 ... ... ... ... ... ... 203
Gaskell and Walters' Contract, *In re*, [1906] 1 Ch. 440 ; [1906] 2 Ch. 1 ; 75 L. J. Ch. 503 ; 94 L. T. 658 ... ... ... ... ... 120
Gillie's Settlement, *Re*, [1917] 2 Ch. 205 ; 86 L. J. Ch. 769 ; 117 L. T. 333 ... ... ... ... ... ... ... ... ... 67
Gledhill *v.* Hunter (1880), 14 Ch. D. 492 ; 49 L. J. Ch. 333 ; 42 L. T. 392 ; 28 W. R. 530 ... ... ... ... ... ... ... 58
Godolphin, Duke of Marlborough *v.* (1759), 1 Eden, 415 ... ... 155
Goldschmidt *v.* Oberrheinische Metallwerke, [1906] 1 K. B. 373 ; 75 L. J. K. B. 300 ; 94 L. T. 303 ... ... ... ... ... 112
Goodman, Dewar *v.*, [1908] 1 K. B. 94 ... ... ... ... ... 204
Gosselin, *In re*, [1906] 1 Ch. 120 ; 75 L. J. Ch. 88 ; 54 W. R. 193 ... 7
Graham, Richardson *v.*, [1908] 1 K. B. 39 ... ... ... ... 179

PAGE
Granville, Eardley *v.* (1876), 3 Ch. D. 826 ... ... ... ... 186
Gray *v.* Gray, [1905] 2 Ch. 502; 74 L. J. Ch. 745; 93 L. T. 459 ... 139
Gregory, D'Eyncourt *v.* (1876), 3 Ch. D. 635; 45 L. J. Ch. 741; 25 W. R. 6 ... ... ... ... ... ... ... ... ... 47
Grey, Pickersgill *v.* (1861), 30 Beav. 352 ... ... ... ... 192
Grierson *v.* National Provincial Bank, [1913] 2 Ch. 18; 82 L. J. Ch. 481; 108 L. T. 632; 29 T. L. R. 501; 51 Sol. Jo. 517 ... ... 239
Griffiths *v.* Vere (1803), 9 Ves. 127 ... ... ... ... ... 142
Griggs, *Re*, [1914] 2 Ch. 547; 83 L. J. Ch. 835; 58 Sol. Jo. 796 ... 81
Gyles, Moyse *v.* (1700), 2 Vern. 384 ... ... ... ... ... 54

## H.

Habergham *v.* Vincent (1793), 2 Ves. Jun., p. 214 ... ... ... 192
Halford *v.* Stains (1849), 16 Sim. 488 ... ... ... ... ... 142
Halton *v.* Hassel (1736), 2 Strange, 1042 ... ... ... ... 185
Hands, Clegg *v.* (1890), 44 Ch. D. 503 ... ... ... ... ... 205
Harkness and Allsopp's Contract, *In re*, [1896] 2 Ch. 358; 65 L. J. Ch. 726; 74 L. T. 122 ... ... ... ... ... ... ... 125
Harris, Howard *v.* (1681), 1 Vern. 33 ... ... ... ... ... 231
Hart, *Re* (1889), 41 Ch. D. 547; 58 L. J. Ch. 752; 60 L. T. 817; 38 W. R. 61 ... ... ... ... ... ... ... ... ... 188
Hartopp, Flower *v.* (1843), 6 Beav. 476 ... ... ... ... ... 274
Hassel, Halton *v.* (1736), 2 Strange, 1042 ... ... ... ... 185
Hastings Corporation *v.* Letton, [1908] 1 K. B. 384 ... ... ... 15
Hatfield *v.* Thorp (1822), 5 B. & Ald. 589 ... ... ... ... 100
Hawkins, *Re*, [1916] 2 Ch. 570; 115 L. T. 543; 61 Sol. Jo. 29 ... 142
Hayward, Thomas *v.* (1869), L. R. 4 Exch. 311 ... ... ... 206
Hazeldine, Ray *v.*, [1904] 2 Ch. 17; 73 L. J. Ch. 537; 90 L. T. 703... 178
Heath, *In re*, [1907] 2 Ch. 270; 76 L. J. Ch. 450; 97 L. T. 41 ... 92
Henty *v.* Wrey (1882), 21 Ch. D. 332; 53 L. J. Ch. 674; 42 L. T. 231 168
Hewett, *In re*, [1894] 1 Ch. 362; 63 L. J. Ch. 182; 70 L. T. 393; 42 W. R. 233 ... ... ... ... ... ... ... ... ... 53
Hewson *v.* Shelley, [1914] 2 Ch. 13; 83 L. J. Ch. 607; 110 L. T. 785; 30 T. L. R. 402; 58 Sol. Jo. 397 ... ... ... ... ... 83
Heys (Mary), *Re*, [1914] P. 192; 83 L. J. P. 152; 30 T. L. R. 637; 59 Sol. Jo. 45 ... ... ... ... ... ... ... ... ... 53
Hinchinbrooke *v.* Seymour (1784), 1 B. C. C. 394 ... ... ... 168
Hobbs, *Re*, [1917] 1 Ch. 569; 86 L. J. Ch. 409; 116 L. T. 270 ... 150
Hogan *v.* Jackson, Cowp. 303 ... ... ... ... ... ... ... 37
Holliwell *v.* Seacombe, [1906] 1 Ch. 426; 75 L. J. Ch. 289; 94 L. T. 186 ... ... ... ... ... ... ... ... ... ... 275
Holmes *v.* Bellingham (1859), 7 C. B. N. S. 329; 29 L. J. C. P. 132; 6 Jur. N. S. 534 ... ... ... ... ... ... ... ... 78
Holtpzaffell, Baker *v.* (1811), 4 Taunt. 45 ... ... ... ... 214
Holyland *v.* Lewin (1883), 26 Ch. D. 266 ... ... ... ... 102
Home and Colonial Stores *v.* Colls, [1904] A. C. 179; 73 L. J. Ch. 484; 90 L. T. 687 ... ... ... ... ... ... ... ... 255
Honeyman *v.* Marryat (1885), 21 Beav. 14 ... ... ... ... 259
Honywood *v.* Honywood (1874), L. R. 18 Eq. 306; 43 L. J. Ch. 652; 30 L. T. 671; 22 W. R. 749 ... ... ... ... ... 47
———— *v.* Honywood, [1905] 92 L. T. 814 ... ... ... ... 156
Hook *v.* Hook (1862), 1 Hem. & M. 43; 1 New Rep. 85; 32 L. J. Ch. 14; 7 L. T. 501; 9 Jur. N. S. 42; 11 W. R. 105... ... ... 16
Hope, *In re*, [1899] 2 Ch. 679; 68 L. J. Ch. 625; 81 L. T. 141; 47 W. R. 641 ... ... ... ... ... ... ... ... ... 48

PAGE

Hope *v.* Hope, [1892] 2 Ch. 336; 61 L. J. Ch. 441; 66 L. T. 522; 40 W. R. 522 ... ... ... ... ... ... ... ... 128
Hoper, Copestake *v.*, [1907] 1 Ch. 366; C. A. [1908] 2 Ch. 10; 76 L. J. Ch. 232; 96 L. T. 322 ... ... ... ... ... ... 186
Horne, Quinion *v.*, [1906] 1 Ch. 596; 75 L. J. Ch. 293; 54 W. R. 344 275
Hotchkin, Bateman *v.* (1847), 10 Beav. 426 ... ... ... ... 138
Howard *v.* Fanshawe, [1895] 2 Ch. 581; 64 L. J. Ch. 666; 73 L. T. 77 200
——— *v.* Harris (1681), 1 Vern. 33 ... ... ... ... ... ... 231
Hoyles, *In re*, [1911] 1 Ch. 179; 80 L. J. Ch. 274; 103 L. T. 817; 27 T. L. R. 131; 55 Sol. Jo. 169 ... ... ... ... ... 25
Hudson, *In re*, [1908] 1 Ch. 655 ... ... ... ... ... ... 190
Huffel *v.* Armitstead (1835), 7 C. & P. 56 ... ... ... ... 194
Hughes and the London and North Western Railway Act, *In re*, [1906] 2 Ch. 642; 75 L. J. Ch. 784; 95 L. T. 379 ... ... 33
——— *v.* Britannia Building Society, [1906] 2 Ch. 607; 75 L. J. Ch. 739; 95 L. T. 327 ... ... ... ... ... ... ... 243
Hulse, *In re*, [1905] 1 Ch. 406; 74 L. J. Ch. 246; 92 L. T. 232 ... 219
Humberston *v.* Humberston (1716), 1 P. Wms. 332 ... ... ... 138
Hunter, Gledhill *v.* (1880), 14 Ch. D. 492; 49 L. J. Ch. 333; 42 L. T. 392; 28 W. R. 530 ... ... ... ... ... ... ... ... 58
Hurlbatt, *In re*, [1910] 2 Ch. 553 ... ... ... ... ... ... 142
Hyland, Bowman *v.* (1876), 8 Ch. D. 588 ... ... ... ... 275
Hyman *v.* Van den Bergh, [1908] 1 Ch. 167; 76 L. J. Ch. 554; 97 L. T. 297 ... ... ... ... ... ... ... ... ... 254

## I.

Idle *v.* Cooke (1703), 2 Ld. Raym. 1151 ... ... ... ... ... 104
Imray *v.* Oakshette, [1897] 2 Q. B. 218; 66 L. J. Q. B. 544; 76 L. T. 632 ... ... ... ... ... ... ... ... ... 200, 263
In the goods of Scott, [1903] P. 243 ... ... ... ... ... 97
Irwin, *In re*, [1904] 2 Ch. 752 ... ... ... ... ... ... 68

## J.

Jackson, Faulds *v.* (1845), 6 N. of C. Supp. 1 ... ... ... ... 97
———, Hogan *v.* Cowp. 303 ... ... ... ... ... ... 37
———, Rous *v.* (1885), 29 Ch. D. 521 ... ... ... ... ... 166
Jacob, *In re*, [1907] 1 Ch. 445; 76 L. J. Ch. 217; 96 L. T. 362 ... 106
Jane Tyrrel's Case (1557), Dyer, 155 ... ... ... ... ... 65
Jeffery, *Re*, [1913] W. N. 339; 58 Sol. Jo. 120 ... ... ... ... 104
Jenkins, Bonnewell *v.* (1876), 8 Ch. D. 70 ... ... ... ... 259
Jevers, Talbot *v.*, [1917] 2 Ch. 363; 86 L. J. Ch. 731; 117 L. T. 430 15
Johnson *v.* Clark, [1908] 1 Ch. 303 ... ... ... ... ... 123
Jones *v.* Lavington, [1903] 1 K. B. 253 ... ... ... ... ... 286
Jupp, *In re* (1888), 39 Ch. D. 148... ... ... ... ... ... 133

## K.

Keech *v.* Sandford: The Romford Market Case (1726), 2 Wh. & T. 693; Ld. Ca. Ch. 61 ... ... ... ... ... ... ... 72
Kilgour *v.* Gaddes, [1904] 1 K. B. 457 ... ... ... ... ... 256
Kreglinger (G. & C.) *v.* New Patagonia Meat Co., [1914] A. C. 25; 83 L. J. Ch. 79; 109 L. T. 802; 30 T. L. R. 114; 58 Sol. Jo. 97 231, 232

## L.


| | PAGE |
|---|---|
| Laird *v.* Briggs (1881), 19 Ch. D. 22 ; 44 L. T. 361 ... ... ... | 256 |
| Land Registry Registrar, Mann, Crossman, Ltd. *v.*, [1918] 1 Ch. 202 ; 117 L. T. 705 ; 34 T. L. R. 39 ; 62 Sol. Jo. 54 ... ... ... | 197 |
| Lavington, Jones *v.*, [1903] 1 K. B. 253 ... ... ... ... ... | 286 |
| Leeds *v.* Cheetham (1827), 1 Sim. 146 ... ... ... ... ... | 214 |
| Lehman and Walker's Contract, *In re*, [1906] 2 Ch. 640 ; 75 L. J. Ch. 768 ; 95 L. T. 259 ... ... ... ... ... ... ... | 266 |
| Le Neve *v.* Le Neve (1748), 3 Atk. 651 ... ... ... ... ... | 289 |
| Leschallas *v.* Woolf, [1908] 1 Ch. 641 ... ... ... ... ... | 219 |
| Letton, Hastings Corporation *v.*, [1908] 1 K. B. 384 ... ... ... | 15 |
| Leuson, Wilkes *v.* (1558), Dyer, 169 a ... ... ... ... ... | 66 |
| Lewin, Holyland *v.* (1883), 26 Ch. D. 266 ... ... ... ... | 102 |
| Lewis *v.* Baker, [1905] 1 Ch. 46 ; 74 L. J. Ch. 39 ; 91 L. T. 744 ; 21 T. L. R. 17 ... ... ... ... ... ... ... ... | 197 |
| Liddell, Barrington *v.* (1852), 2 De G. M. & G. 480 ... ... ... | 142 |
| Lisle *v.* Reeve, [1902] A. C. 461 ; 71 L. J. Ch. 768 ; 89 L. T. 308 ... | 231 |
| London School Board, Bolton *v.* (1878), 7 Ch. D. 766 ... ... ... | 264 |
| Lonsdale, Walsh *v.* (1882), 21 Ch. D. 9 ... ... ... ... ... | 196 |
| Lord Barnard, Vane *v.* (1716), 3 Vern. 738 ... ... ... ... | 40 |
| Lord Ludlow *v.* Pike, [1904] 1 K. B. 531 ; 73 L. J. K. B. 274 ; 90 L. T. 458 ; 20 T. L. R. 276 ... ... ... ... ... | 214 |
| Lord St. Leonards, Sugden *v.* (1876), 1 P. D. 154 ... ... ... | 99 |
| Lord Stratheden and Campbell, *In re*, [1894] 3 Ch. 265 ... ... | 138 |
| Lovejoy, Cheese *v.* (1877), 2 P. D. 251 ... ... ... ... ... | 99 |
| Ludlow (Lord) *v.* Pike, [1904] 1 K. B. 531 ; 73 L. J. K. B. 274 ; 90 L. T. 458 ; 20 T. L. R. 276 ... ... ... ... ... ... | 214 |


## M.


| | |
|---|---|
| Magniac, Dashwood *v.*, [1891] 3 Ch. 306 ... ... ... ... ... | 47 |
| Mann, Crossman, Ltd. *v.* Land Registry Registrar, [1918] 1 Ch. 202 ; 117 L. T. 705 ; 34 T. L. R. 39 ; 62 Sol. Jo. 54 ... ... ... | 197 |
| Markham *v.* Paget, [1908] 1 Ch. 697 ... ... ... ... ... | 286 |
| Marlborough (Duchess), Brace *v.* (1728), 2 P. Wms. 490 ... ... | 241 |
| Marlborough (Duke) *v.* Godolphin (1759), 1 Eden, 415 ... ... | 155 |
| Marquess of Northampton *v.* Pollock (1890), 45 Ch. D. 190 ... ... | 233 |
| Marryat, Honeyman *v.* (1855), 21 Beav. 14 ... ... ... ... | 259 |
| Mary Wood, *In re* (1861), 29 Beav. 236 ... ... ... ... ... | 102 |
| Maw, Elwes *v.* (1802), 3 East, 38 ... ... ... ... ... ... | 220 |
| Meux, Baggett (1844), 1 Coll. 138 ; affirmed (1846), 1 Ph. 627 ... | 124 |
| Micklethwait *v.* Newlay Bridge Co. (1886), 33 Ch. D. 133 ; 55 L. T. 336 ; 51 J. P. 132 ... ... ... ... ... ... ... | 78 |
| Middlesex County Council, Piggott *v.*, [1909] 1 Ch. 134 ; 77 L. J. Ch. 813 ; 99 L. T. 662 ; 72 J. P. 461 ; 52 Sol. Jo. 698 ; 6 L. G. R. 1177 ... ... ... ... ... ... ... ... ... | 207 |
| Mintoft, Dewar *v.*, [1912] 2 K. B. 373 ; 81 L. J. K. B. 885 ; 106 L. T. 763 ; 28 T. L. R. 324 ... .. ... ... ... ... ... | 274 |
| Mitchell, Buckle *v.* (1812), 18 Ves. 100 ... ... ... ... ... | 115 |
| Monckton's Settlement, *Re*, [1913] 2 Ch. 636 ; 109 L. T. 624 ; 58 Sol. Jo. 836 ... ... ... ... ... ... ... ... | 68 |
| Monypenny *v.* Dering (1852), 2 De G. M. & G. 170 ... ... ... | 155 |
| Moore *v.* Rawson (1824), 3 B. & C. 332 ... ... ... ... ... | 256 |
| Morgan *v.* Fear, [1907] A. C. 425 ; 76 L. J. Ch. 660 ... ... ... | 256 |
| ———, Turner *v.* (1803), 8 Ves. 143 ; 11 Ves. 157 n. ... ... | 54 |

PAGE

Morse, Sturgis *v.* (1860), 3 De G. & J. 1 ... ... ... ... ... 34
Mortimer, *In re*, Gray *v.* Gray, [1905] 2 Ch. 502; 74 L. J. Ch. 745; 93 L. T. 459 ... ... ... ... ... ... ... ... 139
Moule *v.* Garrett (1870), L. R. 5 Exch. 132; 39 L. J. Ex. 62; 26 L. T. 367; 20 W. R. 416 ... ... ... ... ... ... 203
Moxhay, Tulk *v.* (1848), 2 Ph. 774 ... ... ... ... ... 206
Moyse *v.* Gyles (1700), 2 Vern. 384 ... ... ... ... ... 54

## N.

Nash, *In re*, [1910] 1 Ch. 1... ... ... ... ... ... ... 155
National Provincial Bank, Grierson *v.*, [1913] 2 Ch. 18; 82 L. J. Ch. 481; 108 L. T. 632; 29 T. L. R. 501; 51 Sol. Jo. 517 ... ... 239
New Patagonia Meat Co., Kreglinger (G. & C.) *v.*, [1914] A. C. 25; 83 L. J. Ch. 79; 109 L. T. 802; 30 T. L. R. 114; 58 Sol. Jo. 97 231, 232
Newlay Bridge Co., Micklethwait *v.* (1886), 33 Ch. D. 133; 55 L. T. 336; 51 J. P. 132 ... ... ... ... ... ... ... 78
Nisbett and Potts' Contract, *In re*, [1906] 1 Ch. 387; 75 L. J. Ch. 238; 94 L. T. 297 ... ... ... ... ... ... ... 206, 247
Nocton, Ashburton (Lord) *v.*, [1915] 1 Ch. 274; 84 L. J. Ch. 193; 111 L. T. 895; 31 T. L. R. 122; 59 Sol. Jo. 145 ... ... 111
Northampton (Marquess) *v.* Pollock (1890), 45 Ch. D. 190 ... ... 233
Nutt's Settlement, *Re*, [1915] 2 Ch. 431; 84 L. J. Ch. 877; 59 Sol. Jo. 717 ... ... ... ... ... ... ... ... ... 68

## O.

Oakshette, Imray *v.*, [1897] 2 Q. B. 218; 66 L. J. Q. B. 544; 76 L. T. 632 ... ... ... ... ... ... ... ... 200, 263
Oberrheinische Metallwerke, Goldschmidt *v.*, [1906] 1 K. B. 373; 75 L. J. K. B. 300; 94 L. T. 303 ... ... ... ... ... 112
Oldham Corporation, Austerberry *v.* (1885), 29 Ch. D. 750; 55 L. J. Ch. 633; 53 L. T. 543; 33 W. R. 807 ... ... ... ... ... 207
Oliver's Settlement, *In re*, [1905] 1 Ch. 191; 53 W. R. 215; 21 T. L. R. 61 ... ... ... ... ... ... ... ... 68
Oxenham, Doe d. Davey *v.* (1840), 7 M. & W. 131 ... ... ... 249

## P.

Paget, Markham *v.*, [1908] 1 Ch. 697 ... ... ... ... ... 286
Palmer, Cadell *v.* (1833), 7 Bli. N. S. 202 ... ... ... ... 135
Park's Settlement, *Re*, [1914] 1 Ch. 595; 83 L. J. Ch. 528; 110 L. T. 813; 58 Sol. Jo. 362 ... ... ... ... ... ... ... 155
Parker *v.* Carter (1844), 4 Hare 400 ... ... ... ... ... 127
Partriche *v.* Powlet (1740), 2 Atk. 54 ... ... ... ... ... 54
Pawley and London and Provincial Bank, *In re*, [1900] 1 Ch. 58 ... 82
Pearce *v.* Bulteel, [1916] 2 Ch. 544; 85 L. J. Ch. 677; 115 L. T. 291 115
Penton *v.* Robart (1801), 2 East, 88 ... ... ... ... ... 219
Phillips, Doe d. Wilson *v.* (1824), 2 Bing. 13 ... ... ... ... 199
Pickersgill *v.* Grey (1861), 30 Beav. 352 ... ... ... ... ... 192

PAGE

Piggott *v.* Middlesex County Council, [1909] 1 Ch. 134; 77 L. J. Ch. 813; 77 L. T. 662; 72 J. P. 461; 52 Sol. Jo. 698; 6 L. G. R. 1177 ... ... ... ... ... ... ... ... ... 207
Pike, Lord Ludlow *v.*, [1904] 1 K. B. 531; 72 L. J. K. B. 274; 90 L. T. 458; 20 T. L. R. 276 ... ... ... ... ... ... ... 214
Plant *v.* Taylor (1861), 7 H. & N. 211 ... ... ... ... ... 211
Pledge *v.* White, [1896] A. C. 187; 65 L. J. Ch. 449; 74 L. T. 323 ... 242
Pollock, Marquess of Northampton *v.* (1890), 45 Ch. D. 193 ... ... 233
Pooley, *In re* (1888), 40 Ch. D. 1; 58 L. J. Ch. 1; 60 L. T. 73; 37 W. R. 17 ... ... ... ... ... ... ... ... ... 100
Powlet, Partriche *v.* (1740), 2 Atk. 54 ... ... ... ... ... 54
Pullin, Asplen *v.*, [1916] W. N. 400 ... ... ... ... ... 182

## Q.

Quinion *v.* Horne, [1906] 1 Ch. 596; 75 L. J. Ch. 293; 54 W. R. 324 275

## R.

Raindle, Brown *v.* (1796), 3 Ves. Jun. 256 ... ... ... ... 53
Raleigh, Vine *v.*, [1891] 2 Ch. 13; 60 L. J. Ch. 675 ... ... ... 142
Rawson, Moore *v.* (1824), 3 B. & C. 332 ... ... ... ... 256
Ray *v.* Hazeldine, [1904] 2 Ch. 17; 73 L. J. Ch. 537; 90 L. T. 703 ... 178
Reeve, Lisle *v.*, [1902] A. C. 461; 71 L. J. Ch. 768; 89 L. T. 308 ... 231
Rhodes, Capital and Counties Bank *v.*, [1903] 1 Ch. 631; 72 L. J. Ch. 336; 88 L. T. 255 ... ... ... ... ... ... 150, 294
Richardson *v.* Graham, [1908] 1 K. B. 39 ... ... ... ... 179
Rickards, Sharp *v.*, [1909] 1 Ch. 109 ... ... ... ... ... 242
Rider *v.* Wood (1855), 24 L. J. Ch. 737, at p. 741; 1 K. & J. 644; 3 Eq. R. 1064 ... ... ... ... ... ... ... ... 17
Right *v.* Darby (1786), 1 T. R. 159 ... ... ... ... ... 195
Robart, Penton *v.* (1801), 2 East, 88 ... ... ... ... ... 219
Robson, *Re*, [1916] 1 Ch. 116; 85 L. J. Ch. 137; 114 L. T. 134; 60 Sol. Jo. 222 ... ... ... ... ... ... ... ... 160
Roebuck, Calcraft *v.* (1790), 1 Ves. Jun. 221 ... ... ... ... 263
Rous *v.* Jackson (1885), 29 Ch. D. 521; 54 L. J. Ch. 732; 52 L. T. 733; 33 W. R. 773 ... ... ... ... ... ... ... 166

## S.

Sabin, David *v.*, [1893] 1 Ch. 523; 63 L. J. Ch. 347; 68 L. T. 237 ... 285
St. Leonards (Lord), Sugden *v.* (1876), 1 P. D. 154 ... ... ... 99
Samson, *In re*, [1906] 2 Ch. 584; 76 L. J. Ch. 21; 95 L. T. 633 ... 118
Sanders, Derry *v.*, [1919] 1 K. B. 223; 88 L. J. K. B. 410; 120 L. T. 194; 35 T. L. R. 105; 63 Sol. Jo. 115 ... ... ... ... 189
Sandford, Keech *v.*: The Romford Market Case (1726), 2 Wh. & T. 693; Ld. Ca. Ch. 61 ... ... ... ... ... ... 72
Scarfe, Casborne *v.* (1737), 1 Atk. 603 ... ... ... ... ... 234
Scott, *In the Goods of*, [1903] P. 243 ... ... ... ... ... 97
Seacombe, Holliwell *v.*, [1906] 1 Ch. 426; 75 L. J. Ch. 289; 98 L. T. 186 ... ... ... ... ... ... ... ... ... 275
Seaton, Doe d. Strode *v.* (1835), 2 Cr. M. & R. 728 ... ... 58, 198

PAGE
Seymour, Hinchinbrooke *v.* (1784), 1 Bro. C. C. 394 ... ... ... 168
Sharp *v.* Rickards, [1909] 1 Ch. 109 ... ... ... ... ... 242
Shelley, Hewson *v.*, [1914] 2 Ch. 13; 83 L. J. Ch. 607; 110 L. T. 785; 30 T. L. R. 402; 58 Sol. Jo. 397 ... ... ... ... ... 83
Short, Trustees, etc., Agency Co. *v.* (1888), 13 A. C. 793 ... ... 248
Sibley *v.* Ashforth, [1905] 1 Ch. 535; 74 L. J. Ch. 361; 92 L. T. 534; 53 W. R. 328 ... ... ... ... ... ... ... 156, 157
Simcoe, *Re*, [1913] 1 Ch. 552; 82 L. J. Ch. 270; 108 L. T. 891; 57 Sol. Jo. 533 ... ... ... ... ... ... ... ... 152
Sissons *v.* Chichester Constable, [1916] 2 Ch. 75; 85 L. J. Ch. 489; 114 L. T. 1163; 60 Sol. Jo. 605 ... ... ... ... ... 184
Smith and Stott, *In re* (1885), 29 Ch. D. 1009 n. ... ... ... 212
Smith *v.* Adams (1854), 5 D. M. & G. 712 ... ... ... ... 191
——, Bleakley *v.* (1840), 11 Simon, 150 ... ... ... ... ... 259
Smithson, Ackroyd *v.* (1780), 1 Wh. & T. 68; 1 Bro. C. C. 503; 3 P. Wms. 22 n. ... ... ... ... ... ... ... 71, 102
Solicitor to the Treasury, Dixon *v.*, [1905] P. 42; 74 L. J. P. 33; 92 L. T. 427 ... ... ... ... ... ... ... ... 99
Somerville and Turner's Contract, *In re*, [1903] 2 Ch. 583; 72 L. J. Ch. 727; 89 L. T. 405 ... ... ... ... ... ... ... 190
Spencer's Case (1583), 5 Coke, 16; 1 Sm. L. C. 11th Ed., p. 55 ... 205
Stains, Halford *v.* (1849), 16 Sim. 488 ... ... ... ... ... 142
Stanley's Settlement, *Re*, [1916] 2 Ch. 50; 85 L. J. Ch. 809; 114 L. T. 933; 60 Sol. Jo. 478 ... ... ... ... ... ... 108
Stockdale *v.* Ascherberg, [1904] 1 K. B. 447; 73 L. J. K. B. 206; 90 L. T. 111 ... ... ... ... ... ... ... ... 214
Stratheden (Lord) and Campbell, *In re*, [1894] 3 Ch. 265 ... ... 138
Stuart and Olivant's Contract, *In re*, [1896] 2 Ch. 328; 65 L. J. Ch. 576; 74 L. T. 450; 44 W. R. 610 ... ... ... ... ... 265
Sturgis *v.* Morse (1860), 3 De G. & J. 1 ... ... ... ... ... 34
Sugden *v.* Lord St. Leonards (1876), 1 P. D. 154; 45 L. J. P. 49; 34 L. T. 372; 24 W. R. 860 ... ... ... ... ... ... 99
Summers, White *v.*, [1908] 2 Ch. 256 ... ... ... ... 158, 159, 250
Surman *v.* Wharton, [1891] 1 Q. B. 491 ... ... ... ... ... 128
Swansborough *v.* Coventry (1832), 9 Bing. 305 ... ... ... ... 178
Sweet, Dowset *v.* (1753), Ambler, 175 ... ... ... ... ... 104

## T.

Talbot *v.* Jevers, [1917] 2 Ch. 363; 86 L. J. Ch. 731; 117 L. T. 430 15
Taltarum's Case, 2 Blackstone, 117 ... ... ... ... ... 31
Taylor, Plant *v.* (1861), 7 H. & N. 211 ... ... ... ... ... 211
Thellusson *v.* Woodford (1798), 4 Ves. 227 ... ... ... ... 140
Thomas *v.* Hayward (1869), L. R. 4 Exch. 311 ... ... ... ... 206
Thompson, *In re*, [1906] 2 Ch. 199; 75 L. J. Ch. 599; 95 L. T. 97; 54 W. R. 613 ... ... ... ... ... ... ... ... 168
Thorp, Hatfield *v.* (1822), 5 B. & Ald. 589 ... ... ... ... 100
Tollet *v.* Tollet (1728), 2 P. Wms. 489 ... ... ... ... ... 169
Treasury Solicitor, Dixon *v.*, [1905] P. 42; 74 L. J. P. 33; 92 L. T. 427 ... ... ... ... ... ... ... ... ... 99
Tringham's Trusts, *In re*, [1904] 2 Ch. 487; 73 L. J. M. 693; 91 L. T. 370; 20 T. L. R. 657 ... ... ... ... ... ... 67
Trustees, etc., Agency Co. *v.* Short (1888), 13 A. C. 793; 58 L. J. P. 4; 59 L. T. 677; 37 W. R. 433 ... ... ... ... ... 248
Tuck, Edwards *v.* (1853), 3 De G. M. & G. 40 ... ... ... ... 142

PAGE

Tucker's S. E., *In re*, [1895] 2 Ch. 468; 64 L. J. Ch. 513; 72 L. T. 619; 43 W. R. 581 ... ... ... ... ... ... 45
Tulk *v.* Moxhay (1848), 2 Ph. 774 ... ... ... ... ... 206
Tullet *v.* Armstrong (1838), 1 Beav. 1 ... ... ... ... ... 124
Turner *v.* Morgan (1803), 8 Ves. 143; 11 Ves. 157 n. ... ... ... 54
Twigg's Estate, *In re*, [1892] 1 Ch. 579; 61 L. J. Ch. 444; 66 L. T. 604 ... ... ... ... ... ... ... ... ... 91
Tyrrel's (Jane) Case (1557), Dyer, 155 ... ... ... ... ... 65

## U.

Upjohn, Ecclesiastical Commissioners *v.*, [1913] 1 K. B. 501; 82 L. J. K. B. 435; 108 L. T. 417 ... ... ... ... ... 182

## V.

Van den Bergh, Hyman *v.*, [1908] 1 Ch. 167 ... ... ... ... 254
Van Grutten *v.* Foxwell, [1897] A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170 ... ... ... ... ... ... ... ... 151
Vane *v.* Lord Barnard (1716), 3 Vern. 738 ... ... ... ... 40
Vere, Griffiths *v.* (1803), 9 Ves. 127 ... ... ... ... ... 142
Vincent, Habergham *v.* (1793), 2 Ves. Jun., p. 214 ... ... ... 192
Vine *v.* Raleigh, [1891] 2 Ch. 12; 60 L. J. Ch. 675 ... ... ... 142

## W.

Waite, Andrews *v.*, [1907] 2 Ch. 500; 76 L. J. Ch. 676; 97 L. T. 428 255
Walker, Blandy Jenkins *v.*, *Re*, Blandy Jenkins, [1917] 1 Ch. 46; 86 L. J. Ch. 76; 115 L. T. 483 ... ... ... ... ... ... 33
Wallis and Grout's Contract, *In re*, [1906] 2 Ch. 206; 75 L. J. Ch. 519; 94 L. T. 815 ... ... ... ... ... ... ... 264
Walsh *v.* Lonsdale (1882), 21 Ch. D. 9; 52 L. J. Ch. 2 ... ... 196
Ward *v.* Develley, [1902] 2 Ch. 488; 71 L. J. Ch. 739; 86 L. T. 890; 50 W. R. 663 ... ... ... ... ... ... ... ... 16
Weld-Blundell *v.* Wolsley, [1903] 2 Ch. 664; 73 L. J. Ch. 45; 89 L. T. 59; 51 W. R. 635 ... ... ... ... ... ... ... 46
Whaley, *In re*, [1908] 1 Ch. 615 ... ... ... ... ... ... 219
Wharton, Surman *v.*, [1891] 1 Q. B. 491 ... ... ... ... ... 128
Wheate, Burgess *v.* (1759), 1 Eden, 177 ... ... ... ... ... 68
Wheeldon *v.* Burrows (1879), 12 Ch. D. p. 31 ... ... ... ... 179
White, Acton *v.* (1823), 1 Sim. & St. 429... ... ... ... ... 124
———, Baker *v.* (1875), L. R. 20 Eq. 166; 44 L. J. Ch. 651; 33 L. T. 347; 23 W. R. 670 ... ... ... ... ... ... 65
——— *v.* City of London Brewery (1889), 42 Ch. D. 237 ... ... 226
———, Pledge *v.*, [1896] A. C. 187; 65 L. J. Ch. 449; 74 L. T. 323 ... 242
——— *v.* Summers, [1908] 2 Ch. 256 ... ... ... 158, 159, 250
Whitlock, Asher *v.* (1865), L. R. 1 Q. B. 1 ... ... ... ... 247
Whitmore-Searle *v.* Whitmore-Searle, [1907] 2 Ch. 332; 76 L. J. Ch. 576; 97 L. T. 160 ... ... ... ... ... ... ... 33
Whorwood, *In re* (1886), 34 Ch. D. 446 ... ... ... ... ... 105
Wilkes *v.* Leuson (1558), Dyer, 169 a. ... ... ... ... ... 66
Willatts, *In re*, [1905] 1 Ch. 378; [1905] 2 Ch. 135; 92 L. T. 195; 93 L. T. 256 ... ... ... ... ... ... ... ... 108

PAGE
Wingrove, Garner *v.*, [1905] 2 Ch. 233 ; 74 L. J. Ch. 545 ; 93 L. T. 131 249
Wolsley, Weld-Blundell *v.*, [1903] 2 Ch. 664 ; 73 L. J. Ch. 45 ; 89 L. T. 59 ; 51 W. R. 635 ... ... ... ... ... ... ... 46
Wood (Mary), *In re* (1861), 29 Beav. 236 ... ... ... ... 102
——, Rider *v.* (1855), 24 L. J. Ch. 737, at p. 741 ; L. K. & J. 644 ; 3 Eq. R. 1064 ... ... ... ... ... ... ... ... 17
Woodford, Thellusson *v.* (1798), 4 Ves. 227 ... ... ... ... 140
Woolf, Leschallas *v.*, [1908] 1 Ch. 641 ... ... ... ... ... 219
Wrey, Henty *v.* (1882), 21 Ch. D. 332 ... ... ... ... ... 168

*** References to "Williams on Real Property" refer to the 23rd Edition.
** „ „ "Goodeve on Real Property" refer to the 5th Edition.
„ „ "Seaborne on Vendors and Purchasers" refer to "Seaborne's Law of Vendors and Purchasers of Real Property," 7th Edition.

# REAL PROPERTY.

## CHAPTER I.

### INTRODUCTION.

The law relating to land is the most difficult branch of English law, partly because it is peculiar to England and differs widely from any other system, and partly because it is founded upon ancient rules and formalities invented to suit a society in which writing was almost unknown, and land was by far the most important form of wealth.

Fortunately for the modern student, statutes enacted during the last seventy or eighty years have abolished many of the formalities and abuses of the earlier law, with the result that a minute study of the early history of the land laws is no longer so absolutely essential as it was to a student of twenty or thirty years ago.

The history of the law of real property is still of great importance, for without it much of the modern law is hard, if not impossible, to understand; but it may now fairly be said to take a second place, and to be less important than a knowledge of the law as it stands to-day. A first explanation of the modern law is rendered far more difficult if the early law is treated at all fully. Consequently in this book the outlines of the modern law will be stated with only such reference to history as is actually necessary, and the student will thus be in a position

to read and understand, and therefore to appreciate the history of the subject as dealt with in larger works on real property, which, of course, he must study with care before he can consider that he has acquired even a working knowledge of the English law of land.

## SECTION I.

### *Ownership of Land.*

*Land cannot be owned* by an individual other than the king.

The early feudal law (*a*) assumed that all land was owned by the king, and in theory the same rule still applies (*b*).

The rule underlies the whole of the English law of land and accounts for many of its peculiarities, so that the modern law cannot be thoroughly understood without some knowledge of the history of this theory.

*The Feudal System.*—The king, as supreme landowner, granted land to certain of his subjects to hold from him; they became his tenants (*tenentes*="persons holding"), and owed him certain services in return for their holdings.

Those who held direct from the king were called tenants in chief or tenants *in capite*.

A tenant in chief usually made grants to other persons to hold the greater part of his lands as his tenants in return for services rendered by them, and these tenants in their turn had other tenants holding of them. Such tenants did not merely hold the land for a specified number of years as in the case of a modern lease, but in most cases the tenant had an interest in the land, which, on his death, would continue in his heirs.

(*a*) During and for some time after the reign of William I.
(*b*) The king is said to be "lord paramount" of all land.

*Explanation of Terms.*

It is impossible to discuss the English law of land without using many words which are unknown to the ordinary English language. The meanings of the following expressions must therefore be *thoroughly mastered* before the student can hope to understand the subject.

*Heir.*—The heir is the person who takes the *land* (*c*) of a tenant on his death if the tenant has not disposed of the land by his will.

A person to whom land is given by will is not the heir, but is called a "*devisee.*" Hence the maxim, "Solus deus heredem facere potest, non homo" ("God alone determines the heir; man cannot").

The heir is usually the eldest son of the tenant; but if there is no son, the daughters, father, brothers, sisters, or remote relations will succeed to the land according to rules which will be explained later.

The eldest son is not an "heir" until he becomes entitled to the land. Hence the maxim, "*nemo est heres viventis*" ("a man cannot have an heir while he is alive").

A living person may have an *heir apparent*, that is, an eldest son, who must be his father's heir if he lives long enough to survive the father.

*An heir presumptive* is the person who would be the heir if the tenant died at once—*e.g.* an only daughter would be her father's heir, if he died and had no son; but the birth of a son would prevent her from becoming her father's heir.

Note that the *heres* of Roman law differed from the English *heir* in two respects: (i.) the *heres* took *all* the property; (ii.) the *heres* could be appointed *by will.*

*Personal Representatives.*—*At common law* (that is, law as it existed apart from statutes) on the death of a tenant of freehold land, the land went direct to the heir, but his movable property (called *Chattels*—

(*c*) *I.e.* the beneficial interest in the land.

because cattle were the most valuable kind of movable) did not go direct to his next of kin or to the *legatee*, but became vested in his *executor*, if the owner appointed an executor by his will, or his *administrator*, a person appointed by the court to take the place of the executor if none was appointed. The executor or administrator is the personal representative of a deceased owner. *Now*, on the death of any person after 1897, all his property, including his land (*d*), goes in the first place to his personal representatives.

*Estate*, means the *interest* which a tenant has in his land. Estates or interests may be of very many different kinds, thus—

*An estate in fee simple*, is an interest in land which, after the death of each tenant, can descend to his heir. It is, therefore, perpetual, and at the present day is practically absolute ownership.

Thus a tenant in fee simple is usually spoken of as the *owner* of the land, sometimes even in legal writings and Acts of Parliament. The term "owner" will frequently be used in this book; but the reader must remember that the word is being used as a shorter way of saying "tenant in fee simple."

"*Fee*" itself means an interest in land which can descend to the heir. It is connected with the word "*feu*dal," the feudal system being a system under which one tenant in fee simple holds from another tenant in fee simple who holds from another, and so on up to the king.

"*To Enfeoff*" is, therefore, "to grant a person the fee."

*Feoffment*, is a formal granting of the fee in the presence of witnesses (*e*).

*Subinfeudation* is to grant a fee simple to another person to hold *sub* (= under) you.

(*d*) Except copyhold land, see *post*.
(*e*) "*Est donatio feodi*." Co. Litt. 9 a.

*An estate in fee tail* (or, more shortly, an *estate tail*) is a fee which can only descend to the issue of the tenant; whereas a fee simple could descend to collaterals, *e.g.* a younger brother of the tenant. An estate tail is created by a grant of land "to A and the heirs of his body," or "to A in tail."

The fee simple is the largest possible estate—hence any estate less than the fee simple is called a *particular estate* (Latin, *particula* = "small part").

If the estate was a fee simple or fee tail or an estate which might last for an uncertain length of time, *e.g.* an estate for the life of a tenant, and if the services rendered by the tenant were considered free (*f*) services, then his holding was a *freehold*, and his rights were protected in the king's court.

But if his estate was for a fixed number of years only, he was at first considered to have been put into the land as the nominee (*g*) of his landlord, and his right to possession was not protected by the court (*h*).

Hence arose the expression *real estate*: a tenant of a freehold who was turned out (ejected) by his landlord or any other person could bring an action to recover the land itself, *i.e.* the "res" or "thing" of which he had been deprived; the action was called a *re-al* action, and the property which could be recovered was *real property*.

If, however, a tenant for a fixed number of years or the owner of a movable chattel were deprived of it, he could not get back the land or the chattel itself, and he merely had an action against the *person* who took it, whereby he could recover damages. Hence the action was a personal action,

(*f*) See p. 9.
(*g*) Bracton, fo. 430.
(*h*) Except against his landlord if he held under a "covenant, *i.e.* a contract under seal.

and any property, other than real property, was called *personal property*, including estates in land for a fixed number of years.

*Chattel-real* is the name given to these interests in land which are not *real estates*—because they partake partly of the nature of chattels and partly of the nature of real property.

It would be hard to discover a more inappropriate name for this kind of property, for it is *not a chattel* (or movable), and was *not real* (or specifically recoverable).

At the present day chattels real are specifically recoverable (*i*), and also personal chattels of unique value.

*Life Estate.*—Since land could not be *owned*, a grant of land to A did not make A an owner of the land, but merely a tenant, and as a person cannot be tenant of land after his death, the grant gave him an estate for his life only, unless the land was also granted to the heirs of A.

The grant to the heirs might be a full grant of the fee simple ("to A. and his heirs"); or it might be a more limited grant (*e.g.* "to A and the heirs of his body"); in either case the addition of these words had the effect of marking out or "limiting" (*i.e.* marking the *limes* or boundary of) the estate of A.

Hence *words of limitation* mean words such as "and his heirs," which mark out the estate of the tenant, although the addition of such words increases the estate rather than limits it (in the usual sense of the word).

*Grantor* is the person who grants land; *grantee* is the person to whom land is granted; in the same

(*i*) This is due to *the action of ejectment*, see later, p. 57. A copyholder had at first no remedy in the king's court if he was ejected by his lord, as he was deemed to hold the land "at the will of the lord"; but a copyhold estate has now come to be considered as "real property."

way, *donor* is the person who gives, and *donee* is the person to whom something is given.

*Mortgagor* is the person who borrows money and makes a mortgage of his land; *mortgagee* is the person who lends the money and receives the land as security.

*Purchase* has a special meaning in law, and includes, not only the buying of land in return for money, but any acquiring of land either by the act of a living person or by the will of a deceased person: That is, a *purchaser* is a person who acquires land by any other means than—

(1) descent on intestacy;
(2) escheat (*j*);
(3) partition;
(4) inclosure.

*Seisin* (connected with the Latin "Sedeo" and "Sessio" = to sit or sitting) means in the first place *quiet possession* of land.

It has nothing to do with seizing or force, and merely implies quietly sitting on land. Compare the expression a "squatter" = a person who acquires land by taking possession of it for more than twelve years.

Later, seisin comes to mean *possession of a freehold*, so that a person cannot be said to be *seised* of land, unless he is in possession of the freehold, either personally or by means of his tenants.

*Hereditament* means property which can descend to the heir, and is thus often used as synonymous with "land" (*k*).

*A corporeal hereditament* is an interest in land in possession, *i.e.* a *present* right to enjoy the possession of land either personally or through tenants.

(*j*) See p. 15, *post*.
(*k*) Money may be a hereditament, if it is settled upon trust to go to the heir with the land *Re Gosselin*, [1905] W. N. 170.

*An incorporeal hereditament* is a right over land in the possession of another, which may be a future right to possession, or a right to use for a special purpose land in possession of another, *e.g.* a right of way.

This distinction is founded on the difference between a *corporeal thing*, which means a thing which can be touched and handled, and an *incorporeal thing*, which means a mere abstract right which cannot be handled.

A *messuage* means a house.

*Premises* strictly means "things previously mentioned."

*Common law* is used in two senses; it may mean either (1) the law applied in the courts of common law, as contrasted with equity, which was applied by the chancellor in the court of chancery;

Originally a person who wished to rely on the Common law had to bring his action in the Common Law Courts; while a person who wished to rely on equity had to go to the Court of Chancery. Since the Judicature Act, 1873, he may obtain any remedy in any court, and the terms "Common Law" and "Equity" denote merely the origin of a rule or law; and this origin may modify to some extent the manner in which the rule is applied.

or (2) the law laid down by decided cases as opposed to law created by statute.

## CHAPTER II.

### CLASSIFICATION OF TENURE.

In one sense *all land is freehold*, for each acre of land is owned by the Crown, and is held by one or more freeholders of the Crown.

An estate in land (or in more popular language the land itself) is said to be either *freehold*, *copyhold* or *leasehold*.

All three estates may exist in the same piece of land. Thus A may hold the freehold of a piece of land as lord of the manor, while B holds it from him as a copyholder, and B may have leased the land to C for 21 years.

To explain the term "copyhold" we must once more go back to the time of William I.

If A, a tenant in chief, granted out part of his lands to B, C, and D, and others, "and their heirs," to hold from him in return for fixed services, *e.g.* to supply a certain number of soldiers, or to plough a certain number of acres of land in each year, B, C, and D were *freeholders*, for their services were free services. In course of time the services rendered by B, C, and D have been changed to a payment in money, or have even been forgotten, but their successors are still *freeholders*.

The same tenant in chief may have granted other parts of his land to E, F, and G and their heirs, who were villagers (*villani*) in return for services which were not *fixed* in their nature, and were therefore considered to be of a servile nature: *e.g.* where the tenant was compelled to work for two days in each week for A, at any kind of work that A might choose. This was called *villein* tenure (the tenure of a "villager"), and this term came to imply "unfree tenure." These tenants were very much under the control of their land-lord, their disputes were settled in the lord's court, and their title to their holdings was entered in the

rolls of the lord's court, their title-deeds being copies of the rolls. Hence this tenure has come to be called *Copyhold*.

Again, the tenant in chief (or his successors) may have granted other parts of his lands to H, I, and J, for fixed terms, *e.g.* as weekly tenants, or for a fixed number of years. In such a case H, I, and J were considered as mere nominees of A, even though the term fixed was 1000 years or more; they have merely a *personal* estate in the land and are called *leaseholders*.

A *freehold estate* may therefore be defined as an estate in land which is not limited to expire within a certain time, and for which the services are not and never have been of an unfree nature.

Freehold estates themselves are of many kinds; they may be classified in two ways: (1) in respect of *tenure*, i.e. the *nature of the services*, and (2) in respect of *quantity*, i.e. the *duration of the estate*.

Classification according to tenure—

1. *Military tenure* or *knight service* (abolished during the Commonwealth) (*a*). The services consisted in fighting for the lord or providing him with soldiers and arms.

2. *Spiritual tenure* or *Frankalmoign* (which may still exist but cannot be newly *created*). Where land was granted to the Church, and no services were due, other than prayers for the soul of the grantor.

3. *Lay tenure* or *socage* [possibly derived from *soc* = a plough-share].

The services were of any kind not being military, and were chiefly agricultural. Nearly all the freehold tenure of the present day is socage tenure.

### *Classification according to Duration of Estate.*

A tenant who held under (1) military tenure or under (3) lay tenure need not necessarily be a tenant in fee simple.

(*a*) Abolition confirmed, 12 Car. II. c. 24.

*A person is a freeholder who holds any of the following estates—*

(1) *A fee simple;*
(2) *A fee tail;*
(3) *An estate for his life or any other definite period of uncertain duration.*

This last sentence needs some explanation. The period must be *definite, i.e.* if it is not a fee simple or fee tail there must be some definite event, on the happening of which the estate will cease. *E.g.* a grant to a widow "until she marries again." The definite event is her re-marriage. But the estate is of *uncertain duration*—you cannot tell how long it will be before she marries again. Therefore it is a freehold. If these words were added "but for not more than 100 years"—a *certain* time would be fixed on the expiration of which the estate must end, and the estate would then be merely *a term of years*, that is to say a *leasehold*.

The *classification of tenure* may be illustrated by the following table:—

*Estates in Land.*

| *Freehold.* | | *Leasehold.* (term of years) | *Copyhold.* |
|---|---|---|---|
| | | | (1) customary fee simple; |
| *Military.* | *Spiritual.* | *Socage.* | (2) customary fee tail; |
| (1) fee simple; | fee simple | (1) fee simple; | (3) life or other |
| (2) fee tail; | | (2) fee tail; | definite estates |
| (3) life or other definite estate of uncertain duration. Now abolished. | | (3) life or other definite estate of uncertain duration. | of uncertain duration. (4) terms of years of copyhold lands. |

# CHAPTER III.

## FORMS OF TENURE.

### SECTION I.

### *Socage Tenure.*

BY far the most important and at the present day practically the only remaining form of tenure in fee simple is *socage* or *lay tenure.*

At the present day a tenant in fee simple usually holds his land direct from the Crown, and is practically owner of the land; but cases still remain in which the tenant in fee simple holds of an over-lord, who holds of the Crown.

To explain this some history is again necessary. In the time of William I. if A held land in fee simple from the king, he could grant the same land to B to hold of him in fee simple, and B could grant it to C to hold of him, and so on, so that the land would be held as follows :—

Each of these, A, B, and C, having a fee simple.

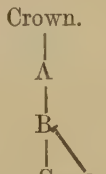
Again C could at that time make a further grant to D to hold of him: but each such "*Subinfeudation*" made the tenant in possession, from whom services were due, more and more removed from A, who was entitled to the services. Hence the tenants in chief obtained the passing of the following statute.

*Statute Quia emptores* (18 Edw. I. c. 1) abolished subinfeudation.

That is to say, it prevented C from granting lands to D in fee simple to hold of him (C); but on the other hand it gave him free power to grant them to D, provided D held of the same lord (B) from whom C held.

Thus the change of ownership shown in dark capitals was impossible after the Act.

But the following change became possible under the Act—




NOTE.—A, B, C, and D all hold *in fee simple*.

Hence a tenant in fee simple cannot now grant land to another to hold *of him in fee simple*, but he can of course still grant his land to another to hold *of him* for a term of years (as in the case of an ordinary lease), or for any other estate which is less than the fee simple.

*Seignory.*—When land is held of another person in fee simple the lord is said to have a *seignory* or lordship.

Thus, in the example given, A and B each has a seignory. Seignory, then, simply means having a tenant *in fee simple* holding of you.

*Manor.*—When several lands are held by different tenants in fee simple of the same lord, the lord is said to have a manor.

A manor usually has many peculiarities which will be dealt with under the head of copyholds; but for the present it is sufficient to note that—

It is essential for a manor that there should be at least two tenants holding of the lord of the manor in fee simple.

If the number of fee simple tenants is reduced to one, or none, the manor becomes a "reputed manor."

Neither a manor nor a seignory can be created without subinfeudation, and therefore new manors or seignories cannot be created now.

But manors and seignories still exist at the present day, being old tenures created before 1290 A.D.

The *services due from a tenant in fee simple to the lord of the seignory* were and are as follows :—

| *Time of William I.* | *Present day.* |
|---|---|
| *Fealty.* — The tenant must swear fidelity to his lord. | The oath of *fealty* can still be exacted, but never is. |
| *Services*, generally of an agricultural nature, which were even then sometimes commuted for a money payment, called *quit rent.* | *Quit rent* is still payable, but the amount became fixed several centuries ago, when the value of money was much greater. Thus, a rent of £2 per annum would be an important rent in the time of Edward I., but would now be merely a nominal rent for a large estate, and has probably been forgotten in the course of centuries. |
| *Relief.*—A sum payable on the death of each tenant, usually equal to one year's quit rent. | *Reliefs* still exist, unless they have been forgotten for the same reason. |

| | |
|---|---|
| *Aids.*—The tenant had to pay his lord the three customary aids, namely, to provide him with money—<br>(*a*) For his ransom.<br>(*b*) For the knighting of his eldest son.<br>(*c*) For the marriage of his eldest daughter. | *Aids* have practically ceased to exist. |
| *Escheat.*—If the tenant died without heirs and intestate, the land *escheated*, or went to the lord. | *Escheat* (*a*) still exists, but the right seldom arises, as tenants now usually make wills, and, if not, they seldom die without heirs (see p. 84). |
| *Forfeiture.*—If the tenant was attainted, or executed for felony, his lands were forfeited, and went to the lord. | *Forfeiture* was abolished in 1870 (*b*). |
| *Suit of Court.*—The tenant must attend the lord's court (see p. 183). | *Suit of Court* may still exist, but is of no practical importance. |

Thus we see that a *seignory* at the present day is almost an empty right, and the tenant in fee simple who holds of an overlord is practically owner, except that he may have to pay a small annual quit rent, and a relief of similar amount, and swear fealty if it should be exacted, and if he dies without a will and without heirs, his land which would otherwise go to the Crown, escheats to the overlord.

(*a*) Land held by a corporation does not escheat. If the corporation comes to an end, the land reverts to the grantor. Co. Litt. 13 b. *Hastings Corporation* v. *Letton*, [1908] 1 K. B. at p. 384.

(*b*) 33 & 34 Vict. c. 23. This Act still remains of practical importance as regards persons convicted before 1870. *Talbot* v. *Jevers*, [1917] 2 Ch. 363.

There were *other forms of socage or lay tenure*, but only two of these (of any importance) survive at the present day.

*Gavelkind Tenure* (*c*) has five peculiarities :—

(1) It is found chiefly in Kent.

So much so that land in Kent is presumed to be Gavelkind unless the contrary is proved.

(2) It descends to all male heirs in the same degree equally.

Usually fee simple lands descend on intestacy to the *eldest* son or his issue, or if there are no sons or children of sons, to the daughters equally ; but gavelkind lands descend to all the sons equally, and this rule also applies to other relations.

*Re Chenoweth ; Ward* v. *Develley*, [1902] 2 Ch. 488. F. Chenoweth, who was a tenant of gavelkind lands in Kent, died in 1900. His nearest male relations were two cousins and the children of a deceased cousin.

*Held*, the land will go, as to one third, to each of the two cousins, and the remaining third to the children of the deceased cousin. Thus the principle of representation applies (*d*).

(3) The *dower* of a widow on the death of her husband is one *half* of his lands for her life, so long as she remains *unmarried* and *chaste*.

In ordinary fee simple lands (as will be seen later) the widow gets *one third* of the lands for her life, without the further limitations as to second marriage and chastity (see p. 130).

(4) The husband of a female tenant takes, on her death, a life estate, by *curtesy*, of one half of her lands, whether issue of the marriage have been born or not.

In ordinary fee simple land the husband takes a life estate in the *whole* of his wife's lands on her death (if she dies intestate), but only if *issue of the marriage has been born alive* (see p. 127).

(*c*) Derived from *Gavel*, or *Gavol* = rent, because the services in Kent were very early commuted for a money payment.

(*d*) *Hook* v. *Hook*, 1 H. & M. 43.

(5) An infant tenant can convey the land by feoffment at the age of 15.

An infant tenant of ordinary fee simple lands cannot convey them, except sometimes for the purpose of a marriage settlement (see p. 120).

*Borough English.*—A form of tenure, which existed, chiefly in Nottingham, before the Norman Conquest, by which the lands descend to the *youngest son*.

But this rule of the youngest taking does not apply to brothers or other relations unless there is a special custom to that effect (*e*).

Another old form of tenure was *tenure in ancient demesne*, which dates from Edward the Confessor, and denotes lands which were held of the king as a private landowner rather than as sovereign. The tenants had special privileges. This form of tenure is now extinct.

## SECTION II.

### *Military Tenure, or Knight Service.*

The services due to the lord by a tenant in knight service were more burdensome than in socage. They comprised all the services due in socage, except quit rent, namely, *fealty*, *reliefs*, *aids*, *escheat*, and *forfeiture*, and also—

*Scutage.*—Originally the tenant had to fight for the lord; but this service was soon commuted for a money payment called scutage (from *Scutum*, a shield).

*Homage.*—Besides swearing fealty, the tenant had to do homage; that is kneel down before the lord and declare himself to be his man (*homo*).

(*e*) *Rider* v. *Wood* (1855), 24 L. J. Ch. 737 at p. 741.

*Wardship.*—If the tenant was an infant the lord was his guardian, and received the rents and profits during his infancy. He could not however be compelled to account to the infant for the rents and profits, and consequently these were usually retained by the lord.

*Marriage.*—The lord had the right to select a suitable wife (or husband) for an infant tenant. He would derive profit from this, because fathers with daughters were willing to pay a premium to the lord in order to obtain a good match for their daughters. If the ward refused to marry the person selected, he forfeited to the lord "*the value of the marriage*," *i.e.*, the amount of the premium which the lord would have obtained.

In socage, the lord had no right of wardship or marriage, for the guardian of an infant tenant was the nearest relation who could not inherit, and he could not sell the marriage except for the ward's advantage.

*Other forms of knight service* were—

*Grand sergeanty*, which consisted in doing some personal service of the value of £5, at least, for the king himself;

*Petty sergeanty*, doing some smaller personal service for the king or lord.

Tenure in knight service was abolished during the Commonwealth, and its abolition was confirmed by the Statute of Tenures in the first year of the restoration of Charles II. (12 Car. II. c. 24). Grand sergeanty was excepted from this statute, and military tenure has therefore ceased to exist, except in a few cases of grand sergeanty.

III. *Spiritual Service, or Frankalmoign.*—This tenure still exists where lands are held by the Church.

The number of such lands is limited, because the statutes of mortmain (as to which see p. 22) aimed at preventing grants of land to the Church or other corporations, and it is only where

such statutes were avoided, or where the lands are granted to the Church by leave of the Crown or under special statutes that spiritual tenure can exist at the present day, and where it does exist the rules are now practically the same as in socage. Hence "tenant in fee simple" will, in this book, be used to mean a tenant in fee simple by socage or lay tenure.

## CHAPTER IV.

### TENANT IN FEE SIMPLE.

*A tenant in fee simple of land is now practically full owner of the land.*

*History.*—The grant of land "to A and his heirs" made A a tenant in fee simple; but it did not make him an absolute owner of the land.

Ownership consists chiefly of three rights—(1) to enjoy, (2) to destroy, (3) to alienate the whole of the thing owned.

(1) The tenant in fee simple has always had full power to enjoy the whole of the land as he likes during his life. This right extends not only to the surface, but also to all things above and below. "*Cujus est solum ejus est usque ad coelum et usque ad inferos.*"

(2) He never had and never can have power to destroy it, from the nature of land itself.

(3) He has now the right to alienate; but this right was only gradually acquired.

### Section I.

### *His Right to Alienate.*

Originally a grant of land to "A and his heirs" meant what it said, viz. that A was to have the land while he lived, and that after A's death it should go to his heirs one after another for the life of each. A could not alienate or part with the land (except for his own life estate) either during his life by sale or gift, or on his death by will.

(1) *Alienation inter vivos* (*a*).—A tenant in fee simple soon acquired the power to grant away the whole fee simple during his life, and this right was finally recognised by the Statute of Quia Emptores (18 Edw. I. c. 1), which, as we have seen (p. 13), allowed *free substitution* of another tenant in fee simple in the place of the original tenant, while it abolished subinfeudation.

(2) *Alienation by will.*—This was more gradual.

(*a*) *Originally.*—Land could not be given by will.

(*b*) *Later.*—Wills of land were made by means of a conveyance *inter vivos*, accompanied by a trust.

As in the Roman law the *Paterfamilias* sold his *familia* to a *familiæ emptor* by the copper and the scales, but subject to a *fiducia* or trust in favour of the persons to be named in his will, so, in English law, the tenant in fee simple *granted* his land to a friend absolutely, and imposed a *trust* or "*use*" on the friend, to hold the land in trust for the persons to be named in the will.

(*c*) *The Statute of Uses* (27 Hen. VIII. c. 10, see p. 63) abolished trusts and uses, and put a stop to this form of will.

(*d*) *The Statute of Wills* (32 Hen. VIII. c. 1) allowed wills of lands to be made; but in case of lands held in knight service only two-thirds could be given by will.

Thus for five years after the Statute of Uses no wills of land could be made; this caused such dissatisfaction that Parliament was forced to pass the Statute of Wills.

(*e*) *The Statute of Tenures* (12 Car. II. c. 24), as we have seen, abolished tenure in knight service, and consequently all lands can now be devised by will.

(*f*) *The Wills Act*, 1837 (*b*), has simplified the

(*a*) This means "by living persons to living persons"
(*b*) 7 Will. IV. & 1 Vict. c. 26.

form of a will and made many important alterations in the effect of a gift of land by will, as to which see Chapter XIII.

(*g*) *The Mortmain and Charitable Uses Act*, 1891(*c*), has removed difficulties which arose by reason of the rule that land could not be given by will to a charity by enacting that the land shall be sold and the proceeds of sale given to the charity (see p. 25).

Thus, at the present day a tenant in fee simple can freely alienate his land both during his life by sale or gift, or, on his death, by will.

So much so that land cannot now be given to a man in fee simple in such a way that he cannot alienate it (*d*).

*Any provision attempting to limit his right of alienation is void.*

*Exemptions to the right of free alienation.*

1. Infants, lunatics, married women restrained from anticipation (*e*), and other persons under a disability, cannot convey lands (see Chapter XV.).

2. *Corporations.—Lands cannot be conveyed to or for the benefit of Corporations*, except to corporations specially authorised to receive lands

(1) by licence from the Crown, or

(2) by statute.

This rule is due to the *Mortmain Acts* (*f*). A conveyance to the use of a corporation is forbidden by the Statutes 15 Rich. II. c. 5. And by the Mortmain and Charitable Uses Act, 1888, s. 1, land "assured to or for the benefit of or acquired by or on behalf of a corporation is forfeited to the Crown." A Corpora-

(*c*) 54 & 55 Vict. c. 73.

(*d*) This and all other similar rules can of course be overridden by Act of Parliament.

(*e*) See p. 124.

(*f*) 7 Ed. I. c. 1 and 15 Ric. II. c. 5, replaced by the Mortmain Act of 1888, 51 & 52 Vict. c. 42.

tion is a body of persons (or even a single individual) which has been incorporated by the Crown or by Statute, and thereupon becomes a *person* in the eye of the law. It is an artificial person, and although the members composing it may die, the Corporation still continues. Hence the maxim—"*A Corporation never dies.*" A Corporation may consist of one person only, *e.g.* the Crown—or the Bishop of London: and if the person for the time being holding the office of King or Bishop should die, the Crown, or the Bishopric, still continues and the lands vested in them have not changed hands. This form of Corporation is called a *Corporation sole.*

When a tenant in fee simple granted his land to a corporation, the lord lost his services; for, since a corporation never dies, there could be no escheat (*g*) and no reliefs. Hence it was called a conveyance into *Mortmain* (= dead hand) and was forbidden. Lands conveyed to mortmain are forfeited to the Crown.

*The rule still exists* (*h*).

*Exceptions* (*i*).—Corporations which can hold lands are—

(1) Corporations to which *special licence* to hold lands is *given by the Crown.*

*e.g.* The Colleges of Oxford and Cambridge.

(2) Corporations *excepted by statute.*

(*a*) Railway companies and other corporations created by statute are sometimes excepted by the statute which creates them.

*e.g.* The Foundling Hospital (*k*).

(*b*) *Companies* formed *for the purposes of gain* under the Companies Act (*l*).

(*c*) Institutions excepted by special statutes.

*e.g.* The British Museum.

(*g*) If the corporation ceases to exist, the lands do not escheat, but revert to the grantor. See p. 15, note (*a*).

(*h*) See Mortmain Act, 1888, s. 1.

(*i*) For the manner in which the general law is now relaxed, see Adler on Corporations, p. 80.

(*k*) 13 Geo. II. c. 29.

(*l*) Companies (Consolidation) Act, 1908, 8 Ed. VII. c. 69, s. 16.

3. *Charities.—Land cannot be conveyed to charities except with special formalities.* This rule is entirely distinct from the rule preventing the conveyance of land to corporations. Thus—

(1) If the charity is a corporation, it cannot hold land at all unless it has special licence.

(2) If it is not a corporation, it may freely hold lands, provided the formalities required by the following Acts are complied with. The main object of the Acts is to prevent lands being given to charity by persons on their death beds.

*The Mortmain and Charitable Uses Act*, 1888 (*m*).—Land cannot be conveyed for charitable purposes unless it is conveyed as follows :—

By deed—

(i.) Attested by two witnesses.

(ii.) Made 12 months at least before the grantor's death.

(iii.) Enrolled within 6 months after it has been made in the Central Office of the Supreme Court.

(iv.) Not containing any power of revocation nor reserving any life or other interest (with certain exceptions) to the grantor.

Exemptions from the provisions of this Act include (as to corporations) gifts by will of twenty acres for a park, two acres for a museum, and one acre for a school house, and gifts by deed for the same purposes without any limit of amount, and also (as regards charities) gifts to the Universities of Oxford, Cambridge, London, and Durham, and the Schools of Eton, Winchester, and Westminster (*n*).

The consequence of this Act was that *land could not be given to charity by will.*

This rule led to considerable hardships and difficulties, for

(*m*) 51 & 52 Vict. c. 42, s. 4.
(*n*) *Ibid.* s. 7.

when lands were given to a charity by will, the testator sometimes became intestate as to those lands. And if legacies were given to charities and were made payable out of the land, so much of the legacy as would ordinarily have been payable out of the land was void. To remove these difficulties the following Act was passed.

*The Mortmain and Charitable Uses Act*, 1891 (54 & 55 Vict. c. 73), contained four principal provisions.

(i.) If land is given to charity by *will*, the gift is not void, but the land must be sold within one year after the testator's death, and the charity gets the proceeds.

(ii.) If money is given by will to be laid out in the purchase of land for a charity, the land is not to be bought; but the charity gets the money.

(iii.) Money charged on land is not to be considered as land, and may, therefore, be given to a charity by will.

(iv.) If the land is required by the charity for actual occupation and not for investment, the Court may sanction the retention of the land by the charity.

The old law still applies in cases where the testator died before the commencement of the Act (*o*).

## SECTION II.

### *Mode of Granting a Fee Simple.*

A grant of land to a person *will not give him the fee simple unless* it is granted to him "*and his heirs*" or to him "*in fee simple.*"

At common law the word "heirs" was absolutely necessary; but now, by *The Conveyancing Act*, 1881 (*p*), the words "in fee simple" may be used instead of the word "heirs"

(and for the purpose of creating an estate tail the words "in tail" may be used instead of the words "heirs of his body").

(*o*) Cf. *re Hoyles*, [1911] 1 Ch. 179.
(*p*) 44 & 45 Vict. c. 41, s. 51.

*But no other words will do.* Any other expression passes a life estate only.

*Re Ethel and Mitchell's Contract*, [1901] 1 Ch. 945.

Land was granted to "Thomas Manton in fee."

*Held.* He took merely a life estate.

*Exceptions.*

(1) *A Corporation Sole, e.g.* the Rector of a parish. The grant may be made to the Rector "and his successors."

(2) *A Corporation Aggregate, e.g.* a limited company. No words of limitation are necessary since the corporation never dies.

The land is usually granted to the company "and its assigns."

Estates in fee simple will of course appear again and again throughout this book, but for the present the characteristics of other estates less than the fee simple will be considered.

## CHAPTER V.

### TENANT IN TAIL.

WHEN land is granted "to A in tail" (*a*), or "to A and the heirs of his body," A becomes a tenant in tail, and the land will go to the issue of A after his death.

A's estate is called an "estate tail," and is an estate less than the fee simple, because, if at any time there should be no "heirs of the body" (*i.e.* issue) of A, his estate will cease. Therefore if X, a tenant in fee simple, grants lands "to A and the heirs of his body," the residue of the fee simple remains in X, and if A's issue should fail the fee simple will go back or *revert* to X.

The persons interested in the land after such a gift are therefore

(i.) A who can enjoy it for life.

(ii.) A's children to whom it is given after his death.

(iii.) X or his heirs, who are to take if A's issue should fail, and who are called the *reversioners* or remaindermen.

Such is the effect of an estate tail at the present day, subject, however, to a right, which is at first sight somewhat extraordinary, namely, the right of A at any time to destroy the rights of all other persons interested in the land, and to give himself the fee simple.

This peculiar right is the result of the history of the law as to estates tail and cannot be properly understood without some knowledge of the curious procedure of the early law, which is now obsolete.

(*a*) These words were authorised by the Conveyancing Act, 1881, 4 & 45 Vict. c. 41 s. 51.

## SECTION I.

### *History of the effect of a grant of land by X to "A and the heirs of his body."*

The intention of X was probably to give an estate to A which should descend to the children and descendants of A for ever; but from the earliest times A, with the help of his lawyers, was continually finding some means of destroying the rights of his children and selling the whole fee simple. Thus the first construction put upon such a gift was as follows:—

I. At common law this was construed to be a grant of the *fee simple conditional upon birth of issue.* That is, if A had any issue born, he could immediately dispose of the whole fee simple.

This was obviously not the intention of the giver, X, and consequently a statute was passed in 1285 enacting that the intention of the giver should be observed, so that on the death of A the land should go to his issue, and if the issue should fail, then back to X or his heirs. Section II. of the statute was as follows:—

II. *Statute De Donis Conditionalibus* ("concerning conditional gifts") 13 Ed. I. c. 1.

"The will (*i.e.* the intention) of the giver shall be from henceforth observed, so that they to whom the land is given . . . shall have no power to aliene (alienate) it; but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail."

Hence the estate of A was called an *estate tail*, because it was *taillé* (Fr. cut down) to him for life and then to his issue. This statute was much disliked, and for nearly 100 years a tenant in tail was unable to destroy the rights of his issue and of the giver and his heirs.

One easy means of doing so would have been a collusive or

fictitious action (similar to the Roman Law *in jure cessio*) which was already in use for conveying lands into mortmain and could have been used by A as follows. A friend of A would claim the land and bring an action in Court—(in Roman Law this was brought before the Prætor anywhere). A would not defend the action and the Court would give judgment that the land belonged to the friend. A judgment of a court of Law was always conclusive and binding on all parties and the result would be that the land would belong to the friend and he could convey it to A free from the entail.

But a statute passed in the same year as the statute *De Donis provided* that a *collusive judgment could be rendered void*, in all cases where the party impleaded (*i.e.* the defendant) made default (*b*).

The lawyers were anxious to find some new method of defeating the statute. A judgment against A was no good, by reason of the last-mentioned statute ; but their efforts were assisted by the three following decisions of the courts, which were not given for the purpose of assisting A to destroy his entail, but were used by the lawyers for that purpose.

III. *Three Decisions of the Court.*

(*a*) That A could sell the entailed land for an estate in fee simple *provided he gave lands of equal value to his issue.*

This obviously did no harm to the issue.

(*b*) That A could sell the entailed land for an estate in fee simple, provided *judgment were given against A to give lands of equal value to his children.*

This decision was based on the assumption that a judgment against A to give the lands was as good as the lands themselves, and this would not be unfair to the children provided A had other lands of equal value. The next decision goes a step further.

(*b*) 13 Ed. I. c. 32.

(*c*) That A might sell the entailed lands for an estate in fee simple, provided judgment were given against *any one* to give lands of equal value to A and his children.

After this judgment the object of the lawyers was to find some way in which a judgment could be given against some person other than A ; *i.e.* against some person other than the defendant, for then A could safely get rid of the whole fee simple, in spite of the statute against collusive judgments.

Advantage was taken of the peculiar procedure of an *action for the Recovery of Land*. The procedure in an ordinary action for the recovery of land was as follows :—

B has bought land from C, who professed to be the owner, but D, a third party, now claims the land as his, and brings a writ of recovery claiming the land from B. B thereupon calls upon C to prove that the land really belonged to him (C) before he sold it to B, *i.e.* B "*vouched C to warranty.*" If D could not prove his title, he lost the action. But if D could prove the better title he won the action, and B who had thus been defrauded by C had a right to judgment against C for the value of the lands.

The tenant in tail (A) therefore adopted the following procedure :—

A friend, D (called the *Demandant*), brought an action against A, and A *pretended* he had bought the land from C, and called upon C to warrant the title. C failed to do this, and judgment was given that the lands belonged to D in fee simple. C was usually a "man of straw," generally the Crier of the Court, and having no lands or money, was willing to allow a judgment to be given against him to give lands of equal value to A and his children. Later it was found inconvenient that the action should be brought against A himself, and consequently a further step was introduced. A conveyed his life interest (which he could dispose of freely) to another friend T, and the action was brought by D against T. T was called the *tenant to the præcipe*, because he was introduced for the purpose of having the *writ of præcipe* (which commenced an action of Recovery) served on him. T,

having really obtained the land from A, vouched him to warranty, hence the full procedure was as follows :—

IV. *The Common Recovery.*—D (the demandant) brought an action of recovery against T (the tenant to the præcipe) ; T vouched A (the tenant in tail) to warranty ; A admitted that he had conveyed the land to T, and A then vouched C to warranty. C (the "common vouchee") admitted that he had sold the land to A (which was not true in fact), and "craved leave to imparl" with A (*i.e.* permission to consult with him outside the court). C then left the court and failed to appear again. Judgment was given *by default* (*i.e.* in the absence of the chief defendant), that the land belonged to D in fee simple and that C must give lands of equal value to T and the issue of A. D afterwards conveyed the fee simple to A and his heirs. The effect of this was to *bar the entail, i.e.* to turn the estate tail into a fee simple ; and it destroyed the rights, not only of A's children, but also of the donor (X) and his heirs. The first reported case in which a recovery was held to have this effect was *Taltarum's case* (*c*).

V. Another mode of barring the entail was *a fine.* D (as before) brought an action of recovery against A, and A proceeded to defend the action. When the proceedings were started, both parties agreed to compromise the action on the terms that D was to have the land and he was to pay A certain money. This compromise was entered on the rolls of the court and put an end (*finem*) to the proceedings. The compromise being entered on the rolls of the court was conclusive against A and his issue.

The effect of fines varied from time to time. At one time fines had to be proclaimed in court, and would then bar A's issue if they did not claim within five years ; later the issue were barred immediately after the proclamation (*d*).

(*c*) 2 Blackstone, 117.
(*d*) See further, "Williams on Real Property," 23rd Ed., p. 103.

*A fine* did not bar the rights of the donor and his heirs, to take the land on failure of A's issue, and therefore the estate which D obtained and which he could sell to another was an estate which would last *so long as A and his issue lived.* This was called a Base fee.

The reader may wonder why any one should use or "levy" a fine, when the effect of a recovery was so much more complete. The reason was this. We have seen that an action of recovery could not be brought except against the person in possession of the freehold; but a fine could be levied whether A was in possession of the freehold or not. Thus, suppose the land had been granted by X to F (the father of A) for his life and then to A and the heirs of his body. A not being in possession during the life of F could not "suffer" a recovery; but he could levy a fine and bar his own issue. If, however, F would agree to act as a defendant in a Recovery, F and A together could bar not only A's issue but also X and his heirs. This distinction is most important as its effect survives at the present day.

*Summary of Distinction between Recoveries and Fines.*

| *Recovery.* | *Fine.* |
|---|---|
| 1. Was a collusive action brought to judgment. | 1. Was a collusive action compromised. |
| 2. The tenant in possession of the freehold must be a party. | 2. The tenant in possession of the freehold need not be a party. |
| 3. It barred the rights of all parties, including the giver of the estate tail and his heirs. | 3. It barred the rights of the issue of the tenant in tail only (*i.e.* of all persons taking *under* the gift of the estate tail). |

VI. *Fines and Recoveries were abolished* in 1833 by the Act for the Abolition of Fines and Recoveries (*e*).

(*e*) 3 & 4 Will. IV. c. 74.

## SECTION II.

### *Present Law.*

By the same Act *an entail may now be barred by a deed enrolled* within six months in the Central Office of the Supreme Court.

The old distinction between the powers of a tenant in possession and one not in possession is still retained as follows :—

*If the tenant in tail is in possession* (*f*), *he can bar the entail without the consent of any one, and he can thereby bar* the rights of all persons, including *the donor and his heirs.*

If the tenant in tail is *not in possession* and any other person has an estate in possession under the instrument creating the entail, the tenant in tail cannot bar the whole entail by deed unless he gets the *consent of the "Protector of the Settlement"* (*g*).

The protector of the settlement is a new officer created by the Act to take the place of the father (F) in our last example. He is the tenant of the first life estate under the document creating the entail, or any other person or persons (not more than three in number) who are appointed to be protectors of the settlement by the document which creates the entail.

*Thus* (as in the last example), land is granted by X to F for life with remainder to A and the heirs of his body. F is the protector, and A cannot bar the claims of X and his heirs without the consent of F (*h*).

(*f*) Except, possibly, where the settlement has expressly appointed a protector.

(*g*) Thus where the life estate was created by a different deed the consent of the tenant for life is not necessary, for then the life tenant is not the protector. *Re Blandy Jenkins' Estate*, [1917] 1 Ch. 46.

(*h*) *Note on 2nd reading.*—A tenant by the curtesy may be protector. If there is no protector, the entail may be barred without any consent. *Re Hughes and the London and North Western Railway Act*, [1906] 2 Ch. 642. If three protectors are appointed and one dies, the survivors can act alone. *Re Bayley-Worthington*, [1908] 1 Ch. 26; affirmed, [1908] A. C. 97. The consent of the protector may be given after the death of the tenant in tail. *Whitmore Searle* v. *Whitmore Searle*, [1907] 2 Ch. 332.

If a tenant in tail *not in possession* bars the entail by deed enrolled *without the consent of the protector*, he bars his own issue only, and creates a *base fee.*

The deed in this case has therefore the same effect as a fine.

Thus, in the last example, if A executed a deed enrolled without the consent of F, and thereby conveyed the land to C, C would get merely a base fee, that is an estate which would last as long as A and his issue lived, but on the death of A and all his issue the land would revert to X or his heirs.

If the deed is *not enrolled* the tenant in tail can only convey his own life interest (*i*).

Thus at the present day a gift to " A and the heirs of his body " creates an estate tail, which will descend strictly to the descendants of A; but A can at any time by a deed enrolled turn his estate into a fee simple.

It is thus impossible to tie up lands in a family for ever.

The most that can be done in this direction is effected by a settlement, which is in outline as follows :—

## SECTION III.

### *The Modern Settlement.*

On the marriage of A, the land is granted to A for life with remainder to his eldest son in tail, with remainder to A's second son in tail and so on.

When A has a son, B, B becomes tenant in tail, and A becomes the protector of the settlement. Therefore as long as A is alive, B cannot bar the whole entail without A's consent. And of course B cannot bar it while he is under 21. So that if B dies under 21, or before he has barred the entail, the land will go to B's children, or if he has none, then to the second son of A in tail, and so on.

(*i*) This is technically an estate defeasible by entry of the issue or of the remainder man if no issue, or by bar of the entail. *Sturgis* v. *Morse*, 3 De G. & J. 1.

Usually, however, A has some influence over his sons on their attaining 21, and he persuades his eldest son, on attaining 21, to join with him in a new deed of settlement as follows :—

When A's eldest son, B, reaches 21, he executes a deed enrolled with the consent of A, and thus bars the entail ; A and B then re-settle the land on A for life, remainder to A's son B for life, remainder to B's eldest son in tail, and so on.

This is done every time that an eldest son reaches 21, and the land may thereby be tied up in a family for generations.

This of course depends on the continuous desire of each father to tie up the lands in the family and on the continuous obedience of each eldest son on attaining 21.

## SECTION IV.

### *General and Special Entails.*

So far we have dealt with a *general* entail only ; that is a grant to " A and the heirs of his body "— without restriction as to the sex of the heirs, and without naming their mother.

But land may be granted in *special tail*, " to A and the heirs *male* of his body " which is called an estate in *tail male*, or " to A and the heirs *female* of his body " which is called an estate in *tail female*, or to " A and the heirs of his body by his wife B." In the last case the land can only descend to A's children by his wife B, and if B should die without issue, it will become impossible for A to have issue who can inherit under the entail.

A is then called a *tenant in tail after possibility of issue extinct.*

If the land is granted to A and the heirs of his body generally it is impossible for him to become a tenant in tail after possibility

of issue extinct: for the law will never consider that a man is too old to have issue, and therefore if A is 90 years old and unmarried, the law will always presume that he might marry and have children.

*A tenant in tail after possibility* (as he is more shortly called) *cannot bar the entail.* He is in much the same position as a life tenant, but he is not responsible for waste (as to which see Chapter VI., s. 2).

Similarly estates tail granted as a reward for services to the State, cannot be barred.

*E.g.* The Blenheim estates granted to the Duke of Marlborough.

# CHAPTER VI.

## TENANT FOR LIFE.

### SECTION I.

### *How a Life Estate is Created.*

LAND may be granted "to A for his life," A then becomes a "tenant for life," or *a life estate may be created by a grant of land to "A";* for, as we have seen, if no words of limitation are added to a grant of land, the grantee is presumed to take a life estate only—the word "heirs" must be added if his estate is to endure after his death.

### *Effect of a gift of land to "A."*

*Present Law.*

(1) In *a will* a gift "to A" is sufficient to give him the *whole fee simple* (see p. 104).

(2) In *a deed*, it gives him *only* a life estate.

*History.*—I. *At Common Law* a gift of land "to A" simply gave A a life estate only, whether the gift was contained in a *deed* or in a will.

But if in a *will* the testator gave "all my *estate* to A," or used other similar words, A would take the whole estate or interest which the testator had.

*Hogan* v. *Jackson*, Cowp. 303.

The testator gave life estates to his mother and others, and then said, "I give to my mother all the *remainder* of my effects, real and personal."

*Held*, this meant the remainder in fee simple.

The effect of the common law rule was to create much hardship in the case of *wills;* for a testator who made his own will would give his land "to A," meaning to give an absolute interest, and would not know anything of the rule which required words of limitation. This rule is now altered in the case of wills.

II. *Since the Wills Act*, 1837—

(*a*) *A devise* (*i.e.* a gift by will) *of land without words of limitation passes the whole fee simple*, or whatever other estate the testator had in the land (*a*).

(*b*) *Deeds.*—The old rule still remains, and a grant of land by deed "to A" gives A a life estate only.

At common law it was absolutely necessary in order to give a fee simple, that the word "heirs" should be used. Since the Conveyancing Act, 1881, the words "in fee simple" may be used instead, or the words "in tail" to create an estate tail. But if any other words are used the grantee takes a life estate only (see p. 25, *ante*).

## SECTION II.

### *Powers of a Life Tenant.*

A tenant for life has—

(1) Power to enjoy the land as he likes during his life, limited, however, by rules which prohibit "*waste*," that is, prevent the life tenant from altering the nature of the land which is to go to the person entitled after his death.

(2) Power to alienate the land; but he cannot sell or give the land for an estate to endure longer than for his own life, for it is a well settled rule that *a man cannot give more than he has got.* This, however,

(*a*) 1 Vict. c. 26, s 28. (For the exact words of this section see p. 308.)

is subject to the powers which are given to a tenant for life by the *Settled Land Acts* (*b*).

(3) On the death of a tenant for life his rights cease except that his representatives are entitled to "emblements," *i.e.* to cut the crops which he has sown.

The emblements are personal estate. They include all artificial crops but not natural products of the soil, *i.e.* pasture grass (*c*).

But this rule does not apply if the tenancy ceased by the act of the tenant himself, *e.g.* if land is given to A for life or until he ceases to reside there. If A ceases to reside, he cannot afterwards claim emblements.

When the tenant for life has granted a lease, and the lease ceases by reason of his death, then, if the rent is the best rent that could be obtained, the tenant is allowed to remain in possession of the land for the rest of the year instead of taking the emblements (*d*).

(1) As to *waste*.—Waste is of three kinds.

1. *Voluntary waste* is any unauthorized act which alters the character of the land.

Thus, cutting down timber, opening and working mines, ploughing up pasture land, etc., are acts of voluntary waste. But the act need not necessarily be one which diminishes the value of the land. Thus, turning arable land into meadow is also waste. This form of waste is sometimes called "ameliorating waste." At common law a tenant for life was entitled to commit waste, unless (1) he was specially prohibited from so doing, or (2) he was a tenant by operation of law, *e.g.* a tenant by curtesy (see p. 126).

At the present day (*e*) *a tenant for life may not commit voluntary waste, unless he is expressly made*

(*b*) See p. 41.
(*c*) II. Blackstone, pp. 122, 123.
(*d*) See Landlord and Tenant Act, 1851, 14 & 15 Vict. c. 25.
(*e*) Since the Statute of Marlborough, 6 Ed. I. c. 5.

"*unimpeachable for waste*" (= not to be impeached or made liable for waste).

If a tenant for life does commit waste, the person entitled to the fee simple could either (1) sue him for damages at Common law, or (2) restrain him by injunction in Equity from committing the waste (*f*). Since the Judicature Act, 1873 (*g*), he can make use of either or both remedies in either branch of the High Court.

2. *Permissive waste* is merely allowing the land to get out of repair.

*A tenant for life is not responsible for permissive waste* unless expressly made responsible.

A tenant for years, however (*i.e.* a leaseholder), is responsible for repairs unless they are expressly undertaken by the landlord.

Note, that "permissive" waste is not "waste which is permitted," but waste which consists in "permitting" the land to become ruinous.

3. *Equitable Waste.—A tenant for life* who is expressly made "*unimpeachable for waste*" *can be restrained from committing wanton destruction.*

*History.*—(*a*) *At Common Law* he could do anything he liked.

(*b*) *In Equity.—The Court of Chancery would restrain him by injunction* from committing wanton destruction.

*Vane* v. *Lord Barnard* (1716), 3 Vern. 738.

Lord B. settled Raby Castle on himself for life *without impeachment of waste*, remainder to his son for life, remainder to the son's sons in tail.

"Lord Barnard having taken some displeasure against his son, got 200 workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass, doors, and boards, etc., to the value of £3000."

(*f*) The old writ of waste by which he could recover threefold damages and cause the land to be forfeited, which was introduced by the Statute of Gloucester (52 Hen. III. c. 23), was abolished in 1833. See Goodeve, "Real Property," 5th ed., p. 138.

(*g*) 36 & 37 Vict. c. 66.

*Result*, the Court granted an injunction to prevent further waste, and ordered him to repair the castle.

*Note*, therefore, that "Equitable" waste does not mean "waste which is equitable," but waste which is so inequitable that it *would be restrained in Equity*, although allowed at Common Law.

(*c*) *At the present day*, since the Judicature Act, 1873, he can be restrained from wanton destruction in any branch of the High Court.

(2) *Power to alienate.*

*Powers of a Tenant for Life under the Settled Land Acts.*

*Objects of the Acts.*—The most usual way in which life estates are created is in case of *settlements* of land (see p. 34, *ante*).

The land is granted
to A for life,
with remainder to his eldest son in tail, etc.

The result was formerly that A, having only a life interest, could not sell the fee simple, and the son of A until he reached 21 could not sell it, being an infant. When the son reached 21, A and the son together could bar the entail (see pp. 28 to 33), and sell the fee simple. But the custom is that the son should, immediately after attaining 21, re-settle the land to A for life, remainder to himself (the son) for life, remainder to his (the son's) eldest son in tail.

Thus *the land could only be sold once in a generation*, i.e. as each eldest son reached 21.

It therefore frequently happened that, as land decreased in value, a family became too poor to keep up the estate properly, and the land would go to ruin, while the family lived in poverty.

To prevent this the Settled Land Act was passed in 1882 to enable A to sell the whole fee simple, *i.e.* to turn the land into money; but the money must be tied up in the same way as the land, so that the rights of all parties after a sale may be exactly the

same as before, except that the land has become money.

Other Acts amending and extending the first Settled Land Act have been passed, and are usually called "the Settled Land Acts, 1882 to 1890." The following is a summary of the powers under these Acts.

I. *Power to Sell.*

*The tenant for life may sell the whole fee simple.*—(This is a striking exception to the rule that a man cannot sell more than he has got (*h*).)

(1) *Provided he gives notice to the trustees* of the settlement.

He must give one month's notice to the trustees. His power is not in any way dependent on the *consent* of the trustees; the object of giving them notice is merely that they may watch over his exercise of the power, and appeal to the court if they think he is exceeding it or using it unfairly.

The *consent of the trustees is required* only if he wishes to sell the *principal mansion house* or the lands occupied therewith.

It was thought that some further restriction should be imposed, if he wished to sell the house in which the family had always lived, and therefore the *consent* of the trustees or the Court is required (*i*).

A house is *not* considered to be a *principal mansion house* if either (1) it is generally used as a farm house, *or* (2) if the park and lands usually occupied with the house do not exceed twenty-five acres (*i*).

(2) The price *must be the best price* that can reasonably be obtained. The tenant for life is a trustee of his powers for the other persons entitled under the settlement.

(*h*) The explanation is that the tenant for life sells under a special statutory power as a sort of agent for all the persons interested in the property.

(*i*) Settled Land Act, 1890, s. 10.

(3) The *purchase money must be paid to the trustees* and invested by them, and the investments must be held on the same trusts as the land.

Money arising from the sale of land or from the exercise of any of the other powers of the tenant for life is called "capital money." This means that it must be treated as capital, and invested, and must not be paid to the tenant for life as income. When the investments are made, the *income* of the investments is paid to the tenant for life.

II. *Power to exchange* the settled land for other land in England. The land taken in exchange must be held on the same trusts as the original land. *Notice* must be given to the trustees, and their *consent* must be obtained if the principal mansion house is to be exchanged. If the values of the exchanged lands are not quite equal, money may be taken or given to make up the difference (*k*).

III. *Power to Lease.*

The tenant for life may make leases of the land to endure *beyond his own life*, provided—

(1) The *rent is the best* that can reasonably be obtained.

(2) The lease must *take effect in possession* within twelve months (*l*).

*E.g.* a lease could not be granted in 1908 to commence in 1912.

(3) *Notice* must be given to the trustees (or their consent obtained in case of the principal mansion house).

*Exception.*—Leases for not more than 21 years do not require notice to the trustees (*m*).

(4) The periods for which leases are allowed are :—

(*k*) Settled Land Act, 1882, s. 3 (iii.), and s. 21 (iv.).
(*l*) *Ibid.*, s. 7 (i.).
(*m*) Settled Land Act, 1890, s. 7.

(*a*) *Building Leases*, 99 years.

When a tenant in fee simple has vacant land which is suitable for building, he frequently makes a long lease, usually for 99 years to a builder, at a small rent, in consideration that the builder will build houses upon the land. The rent of the houses will be paid to the builder for the 99 years, subject to the payment of the small rent or "ground rent" to the tenant in fee simple. At the end of the 99 years the land with the houses on it reverts to the tenant in fee simple.

(*b*) *Mining Leases*, 60 years.

Where the mines are already opened a tenant for life can at common law, apart from the Act, work the mines himself (*n*), and, where the mines are not opened, a tenant for life, who is *unimpeachable* for waste, can open and work them apart from the Act; but he cannot make a *lease* for that purpose for longer than his own life, except under the Act.

A tenant for life who is liable for waste cannot apart from the Act work un-opened mines at all.

When mines are worked, the capital value of the land is gradually decreased, because the land without the minerals is often worth very little.

It is therefore thought right that if the tenant for life wishes to take advantage of this Act, he should not be allowed to keep all the proceeds of the working of the mines under the lease, and therefore he must set apart and pay to the trustees part of the rent in each year. Where he had power himself to work the mines, he is naturally not compelled to set aside so much as if he had no such power. Consequently the following rules are made:—

If the tenant for life is *unimpeachable for waste* in respect of minerals (*i.e.* if he could have worked the minerals himself), he may keep $\frac{3}{4}$ of the rent of a mining lease, and $\frac{1}{4}$ must be paid to the trustees and invested.

If the tenant for life is *impeachable* for waste in respect of minerals (*i.e.* if he could *not* have worked

(*n*) *Re Chaytor*, [1900] 2 Ch. 804.

the mines himself), he may keep $\frac{1}{4}$ only of the rents, and $\frac{3}{4}$ must be paid to the trustees and invested.

The tenant for life, of course, gets the interest on the part which is invested.

(*c*) *Other Leases*, 21 years (*o*).

This applies to leases other than building or mining leases, *e.g.* agricultural leases, or a lease of a house already built, *i.e.* an "occupation lease."

IV. *Power to make improvements* on the settled land, and to have them paid for out of capital money.

These provisions as to improvements are very detailed and technical, and the student may fairly be content if he can master the following main principles.

The tenant for life should draw up a scheme of the improvements required, and it should be sanctioned by the trustees and approved by the Board of Agriculture, or by a surveyor appointed by the trustees and approved by the Board or by the Court (*p*). If, however, this is not done, the expenditure *may* be allowed by *the Court* (*q*).

The power to spend or allow capital money for improvements exists under the three following heads :—

(i.) *Under the Act of* 1882 (*r*) : For various purposes including drainage, sea walls, roads, cottages, farm houses, tramways, railways, water supply, etc.

(ii.) *Under the Act of* 1890 (*s*).

(*a*) Bridges.

(*b*) *Structural alterations and repairs, if reasonably necessary for letting* the house and land.

(*o*) Settled Land Act, 1882, s. 6.
(*p*) S. 26.
(*q*) *Re Tucker's S. E.*, [1895] 2 Ch. 468.
(*r*) S. 25.
(*s*) S. 13.

(*c*) Re-building houses ordered to be demolished by a local authority.

(*d*) *Re-building the principal mansion house,* but *not more than half the annual income* of the settled estate must be spent.

(iii.) Under the general jurisdiction of the Court.

This is only allowed for *salvage,* that is, when the expenditure is absolutely necessary to preserve the property from ruin (*t*). Such cases are very rare.

The principal forms of expenditure which are *not allowed* are therefore—

(1) *Ordinary repairs.*

For though, as we have seen, a tenant for life cannot be made responsible for permissive waste, *i.e.* cannot be compelled to do the repairs, yet it is his duty (morally, at least) to keep the estate in a reasonable state of repair, and therefore if he does the repairs he cannot recover his outlay out of the capital moneys.

(2) Alterations and additions, if he intends to live in the house himself.

These are only authorized to enable the house to be let: if therefore he finds the house is not sufficiently commodious for himself, he must pay for the alterations.

(3) The extra cost of re-building the mansion house, if the cost exceeds half the annual value of the estate.

V. Power to *cut and sell timber.*

(*a*) If the tenant for life is *unimpeachable for waste* he can cut and sell the timber (except timber planted for ornament or shelter) apart from the Act, and can keep the whole proceeds himself (*u*).

(*t*) *Re De Teissier's S. E.,* [1893] 1 Ch. 153.
(*u*) *Weld-Blundell* v. *Wolsley,* [1903] 2 Ch. 664.

The tenant for life can cut trees not timber (*x*), except where they are planted for ornament or shelter. The proceeds of trees wrongly cut belong to tenant for life at law, but he is liable for waste. It is doubtful whether equity would allow him to keep the proceeds.

Note the difference between this rule and the rule relating to a lease of minerals on p. 44.

(*b*) If the tenant for life is *impeachable for waste* he cannot cut timber (*y*) except under the Act, and he must then (1) get the *consent* of the trustees or the court; and (2) set apart ¾ of the proceeds as capital money (*z*).

VI. Power to *sell heirlooms* or chattels settled to go with the land.

Heirlooms (in the strict sense of the word) are chattels which by force of a special custom descend with the land: *e.g.* Crown jewels. Other chattels are sometimes settled as nearly as possible in the same way, and are frequently spoken of as heirlooms.

Before the Act a person absolutely entitled to an heirloom could sell it during his life, but there was no power even for the Court to allow heirlooms or settled chattels to be sold by a tenant for life.

*D'Eyncourt* v. *Gregory* (1876), 3 Ch. D. 635.

The house on the settled estate was small. Valuable pictures which had been settled as heirlooms entirely filled two rooms and were being spoilt for want of attention. The tenant for life could not afford to have them properly looked after.

*Held*, the Court has no power to order a sale of the pictures.

By the Act the tenant for life may sell such settled chattels, but only *under an order of the Court.*

The Court will not make the order for sale unless it is really for the benefit of the estate as a whole.

(*x*) *Honywood* v. *Honywood*, L. R. 18 Eq. 306.

(*y*) Except where by custom the estate has been treated as a timber estate. *Dashwood* v. *Magniac*, [1891] 3 Ch. 306

(*z*) S. 35.

*Re Hope*, [1899] 2 Ch. 679.

The Court refused to allow the tenant for life, who was in difficulties through his own extravagance, to sell a famous diamond for £18,000.

The proceeds of sale must be invested as capital money, or may be applied in the purchase of other chattels to be settled in the same way.

VII. *Power to mortgage the fee simple.*—This is only allowed for certain purposes for the benefit of the estate.

*E.g.* for paying off incumbrances on the Settled Land.

## SECTION III.

### *Tenant "pur autre vie."*

We have seen that a tenant for life could always sell or convey his own estate or interest in the land, and that the purchaser or grantee thereby acquired an estate which would last so long as the original tenant for life lived. The estate which the purchaser thus acquired is called "*an estate pur autre vie*" (= an estate for the life of another).

Thus, land is granted by X (tenant in fee simple) to A for life.
A sells and conveys his estate in the land to B.
B becomes tenant *pur autre vie.*
A is called the *cestui que vie* (="he for whose life").

On the death of a tenant *pur autre vie* the estate descends (for the rest of the life of the *cestui que vie*) in the first place to his personal representatives (by virtue of the Land Transfer Act, 1897). And they hold it in trust for the persons to whom he has given it by will; or if he died intestate, in trust—

(1) If the estate was granted to the tenant "*and his heirs*" for the life of another, then for the heir or other person entitled to the real estate of the tenant *pur autre vie;*

(2) If the estate was granted to the tenant simply without the words "heirs" or "in fee simple," then for his next of kin or other persons entitled to his personal estate.

The history of this rule is as follows :—

1. *At Common Law* his estate went either to the "special occupant" or "the general occupant."

*Special occupant.*—If the estate was granted to the tenant "and his heirs" for the life of another, on the death of the tenant the land went to the heir of the tenant as "special occupant" for the rest of the life of the *cestui que vie.*

*General occupant.*—If the estate was granted to the tenant without further words, he had only a life estate, and there was no person entitled to take it on his death. It went, therefore, to the first person who took possession of the land.

Thus, the *general occupant* was the first person who entered on land held *pur autre vie* after the death of the tenant *pur autre vie* if he died before the *cestui que vie.*

*I.e.* In the example given on the last page, if B died before A—

A could not claim the land, for he had parted with his whole interest in it: X could not claim it, for he had conveyed it away for the life of A. B's heir could not claim it, because it was not given to "B and his heirs." Therefore no one was entitled, and the first person who entered on the land could keep it during the rest of A's life.

If, however, A had conveyed his life interest to "B and his heirs," then there could be no difficulty, for the heir of B would take, as *special occupant.*

2. *The Statute of Frauds* (*a*) abolished the *general* occupant; for it enacted that a *tenant pur autre vie*

(*a*) 29 Car. II. c. 3, s. 12; and see now the Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26, s. 6).

*might dispose of his land by will;* and *if he should die intestate* then—

(i.) If the land was given to him without words of limitation it should go to his *personal representatives.*

(ii.) If the land was given to him "*and his heirs*" it should go to the *heir* of the tenant *pur autre vie* as *special occupant.*

Thus the *general* occupant can now never take; but the *special* occupant can still take if (1) the land was given "to A and his heirs," *and* (2) A dies without disposing of the land by his will.

3. *By the Land Transfer Act,* 1897.

The land goes to the personal representatives in any case, and they hold it in trust for the heir, next of kin or devisee as the case may be.

A *Quasi Entail* is an estate tail *pur autre vie.*

Thus, land is granted by X to A for life.
A grants his estate "to B and the heirs of his body."
B has a quasi-entail, which he can bar by deed without enrolment.

# CHAPTER VII.

## JOINT TENANTS AND TENANTS IN COMMON.

### SECTION I.

### *Nature of Joint Tenancy.*

WHEN the same piece of land is held by several tenants at once, they are either *joint tenants*, or *tenants in common*, or co-parceners (*a*).

The chief difference between joint tenants and tenants in common is this, that when one *joint* tenant dies, the whole land goes to the survivors; and on the death of the last survivor, *the whole land* goes to the heirs (or under the will) of the last survivor. This is called *survivorship*.

When one tenant *in common* dies, his estate does not *survive* to the others, but goes to his heir or under his will.

In either case, each of the tenants has, during his life, an equal right with the others to the *whole* of the land.

*E.g.* two barristers share a room in Lincoln's Inn, each has as much right as the other to use any part of the room.

Each is said to hold an *undivided share*. If, however, each tenant agrees to take a specific part of the whole as exclusively his property, they are no longer joint tenants or tenants in common. The estate has been *partitioned*.

*E.g.* a widow on the death of her husband has a right to *dower*, *i.e.* to have one third part of the land marked out "by

(*a*) As to which see p. 86.

metes and bounds" for her separate enjoyment during her life. The widow is not a tenant in common or joint tenant with the heir.

*The test to determine whether persons are joint tenants or tenants in common* is as follows :—

Persons cannot be joint tenants unless their estate complies with *all four* of the following requirements, which are usually called *the four unities* of joint tenancy.

(1) *Possession.*—Each tenant must be entitled to possession of the *whole* land equally with the others (*b*).

(2) *Interest.*—Each must have the same estate or interest in the land.

*E.g.* all must be tenants in fee simple, or all life tenants. A tenant for life cannot be a joint tenant with a tenant in fee simple.

(3) *Title.*—Each must take under the same title, *i.e.* the estate of each must be created by the same instrument.

(4) *Time.*—Each must hold from the same time and for the same time.

*An exception* to this rule may occur where land is granted by means of a use.

*E.g.* A grants lands—
To X in fee simple,
To the use of himself (A) and any wife he may marry for their joint lives, etc.
A has a life estate at once—but on his marriage his wife will have a joint estate with him, though her estate will begin after his (*c*).

If any one of these tests or unities is not complied with, the estate is a tenancy in common.

(*b*) But he can be sued for an account, 4 Anne, c. 16, s 27
(*c*) See Goodeve, "Real Property," 5th ed., pp 230, 231.

A conveyance of land by deed to several persons creates a joint tenancy unless anything appears to the contrary;

for they hold the same estate, by the same deed, for the same time.

But if they have paid unequal shares of the purchase money or any other inequality is shown, they are considered as tenants in common in equity.

Equity will always construe the gift as a tenancy in common if there is any sufficient ground for doing so. Thus in a will slight indications are enough to show a tenancy in common. And partners are always deemed to be tenants in common in equity for certain purposes.

Persons may be joint tenants in fee simple or for any smaller estate, *e.g.* for life, or in tail.

*Joint tenancy in tail.*

If land is granted to A and B and the heirs of their bodies, then—

(1) If A and B could possibly intermarry, the land will go to them for their lives, and after the death of both, to their children if they have intermarried.

(2) If A and B could not intermarry, then on the death of the survivor the land will go, half to the heirs of the body of A, and half to the heirs of the body of B.

## SECTION II.

### *Severance.*

*Any joint tenant may sever the joint tenancy, i.e.* turn it into a tenancy in common.

He may do this by (i.) an agreement to sever, (ii.) by a sale or transfer of his share to another person, or (iii.) by a mere agreement to sell or transfer (*d*). *E.g.* by an agreement to make mutual wills (*e*).

(*d*) *Brown* v. *Raindle* (1796), 3 Ves. Jun. 256; and *Re Hewett*, [1894] 1 Ch. 362.

(*e*) *Re Mary Heys*, deceased, [1914] P. 192.

But a declaration by one joint tenant that the tenancy should be severed, is not sufficient unless it amounts to an agreement (*f*).

A mere intention to sever is not sufficient (*g*).

*If one joint tenant conveys his share to another person,* the *grantee becomes a tenant in common* with the others.

Thus, A, B, and C are joint tenants; if A sells his share to D, D becomes a tenant in common with B and C; but B and C remain joint tenants as between themselves.

If D dies, his share goes to his heir; but if B dies, his share goes to C.

A joint tenancy cannot be severed by will (*g*).

## SECTION III.

### *Partition.*

Any joint tenant has, since the time of Henry VIII., always had a right to have the land *partitioned, i.e.* to have it divided up so that each takes a specified part of the land as his exclusive property.

He could apply to the Court by writ of partition (*h*), and he was entitled to have the land specifically divided, even if all the others wished to have it sold.

*The Court had no power to decree a sale instead of partition.*

*Turner* v. *Morgan* (1803), 8 Ves. 143; 11 Ves. 157 n.

A house was devised to three persons to be divided equally. One bought a third share from another. The house was ordered to be divided. The person entitled to one third objected to the partition as ordered on the ground that the other had all the chimneys, all the fireplaces, and the only staircase in the house.

*Held*, the partition must stand.

(*f*) *Partriche* v. *Powlet* (1740), 2 Atk. 54.
(*g*) *Moyse* v. *Gyles* (1700), 2 Vern. 384.
(*h*) Goodeve, p. 236.

Now, by the *Partition Act*, 1868 (*i*)—

The Court has power to order a sale instead of a partition. The views of the holders of the greater share prevail unless the minority can prove to the Court that their view is the most beneficial, thus—

(1) If *persons interested to the extent of one half* or more demand a sale, the Court will decree a sale, *unless the others can prove* that there is some good reason why the property should not be sold.

(2) If *any person interested* (*e.g.* to the extent of one tenth only) demand a sale, and *if he can show* that a sale will be more beneficial, the Court *may* decree a sale.

(3) If any person interested demand a sale, the Court *may* decree a sale unless the other parties will buy his share at a valuation.

In all these cases the Court has a discretion.

(*i*) 31 & 32 Vict. c. 40.

## CHAPTER VIII.

### ACTIONS FOR THE RECOVERY OF LAND.

A PERSON who claims land now commences an action by a writ, usually in the King's Bench Division, in much the same manner as most other actions.

The action is usually called an "action of ejectment," for the following reason :—

Freehold land was at first the only form of property which could be specifically recovered. The old actions for this purpose were—

I. *To recover the property* in land, or, more strictly, to recover the whole fee simple interest.

*The Writ of Right*, which was commenced by the writ of *Præcipe*, was a very formal action by which a person not in possession of land could recover the fee simple from the person in possession *if he could prove his title.*

The person in possession was presumed to be the owner unless the claimant could prove a better title. The rules of proof were very strict and the slightest flaw or mistake might cause the claimant to lose his case.

II. *To recover Possession.*—It was thus a great advantage to be able to get possession of land ; for the burden of proof would then lie on any other person who tried to obtain the ownership. Thus it is that "Possession is nine points of the law." In order to facilitate the recovery of *possession*, two actions were introduced in the time of Henry II.

(*a*) *The assize of novel disseisin.*—

*Assize* here means a trial by jury.
*Novel* ,, recent, or new.
*Dis-seisin* ,, dis-possession.

The action was therefore a trial by which a person who could prove that *he had been in possession* and had been *recently* turned out by another, could be put back into *possession.*

This action only determined the right to *possession*, and the other party could afterwards bring his writ of right and recover the land again, *if he could prove his title.*

(*b*) *The Assize of Mort d'ancestor.*

This was a similar action, in which the plaintiff had merely to prove that *his ancestor was in possession*, that *the ancestor was dead*, and that *he was the heir.* He would then be put in possession, leaving the other party to bring the writ of right if he thought he could establish his claim.

*Leasehold estates* could not be recovered by any of these remedies. If a leaseholder was *ejected* (= thrown out) from his land, he could recover damages only. But in the reign of Edward IV. a new remedy was introduced called—

*The Action of Ejectment.*

By this action a leaseholder who was *ejected* from his land could recover the *land itself.* If he was ejected by his landlord, he had to prove the lease ; but if he was ejected by a third party, he had to prove also that the landlord who granted him the lease had the freehold ; otherwise the lease would be void.

*The Action of Ejectment was used by freeholders.*

The writ of right was very formal and costly, so much so that a freeholder who claimed that another was in wrongful possession of his land preferred to make use of the Action of Ejectment. This was done as follows :—

The person claiming the freehold entered on the land and made a lease of the land to a friend ; the person in possession ejected the friend, who then brought the action of ejectment, claiming that he was

a leaseholder who had been ejected by the person in possession. The friend, in order to show that his lease was valid, had to prove that the claimant who had granted him the lease was really entitled to the freehold, and thus the question of title to the freehold was indirectly settled.

Thus A claimed the freehold. B was in possession. A entered on the land with a friend, C, and made a lease to C for one year. B then ejected C. C brought the action of ejectment against B, and in order to prove the validity of his lease, had to prove A's right to the freehold.

The title of the action would be "C on a demise (=lease or transfer) from A *versus* B"—or more shortly "C *d.* A *v.* B."

Later the "lease, entry, and ouster" became fictitious.

*I.e.* A did not really take C on to the land, but he alleged that he had done so, and B was not allowed to dispute the allegation. C. then, instead of being a real person, became the fictitious person John Doe.

The title of the action then became "Doe *d.* A *v.* B.

Note, for instance, in the list of cases at the beginning of this book, the case of *Doe* d. *Strode* v. *Seaton*, and others. All these are cases where the freeholder is bringing an action for ejectment under the fiction that he has made a lease to John Doe.

This curious form of procedure was abolished in 1852 (*a*), and a special form of writ for the recovery of land was created.

Now, by virtue of the Judicature Act, 1873, and the Rules of the Supreme Court made since that Act, the form of writ is the same as in other actions; but some of the special rules of procedure which were applicable to the action of ejectment are still retained (*b*).

(*a*) Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, ss. 168, 169.
(*b*) See judgment of Jessel, M.R., in *Gledhill* v. *Hunter*, 14 Ch. D. at p. 496.

# CHAPTER IX.

## EQUITABLE ESTATES.

### SECTION I.

### *Before the Statute of Uses.*

THE rules of common law as to rights in and dealings with land, and the means by which land could be recovered, were very strict; for the common law courts followed precedents and refused to recognize any new rights or new forms of dealing with land.

Thus, we have seen, at common law, land could not be given by will, but a means was invented by which testators conveyed their lands to a friend under a trust (*a*). The common law courts refused to recognize a will made in this form and refused to recognize the trust. Consequently if the friend denied the trust and claimed to hold the land for his own benefit, the testator or the persons interested under his will had no remedy in the courts of law.

At first the only remedy for a person who was aggrieved by this harshness of the common law was to appeal to the King. As these appeals became more numerous, the King referred them to the Chancellor, who was formerly the King's chaplain and secretary and as such the keeper of his conscience. In course of time these appeals became too numerous for the Chancellor, and a separate department or *Court of Chancery* was established to deal with cases where the common law gave no remedy.

The most important of these were cases where a

(*a*) See p. 21.

person had refused to recognize a *trust*. The Chancery Court compelled him to perform the trust and would in other respects enforce equitable or moral claims not recognized by the common law.

*The Court of Chancery could not alter the common law*, but it could prevent a person from exercising his common law rights, where it was inequitable that he should do so (*b*).

Thus, in the case of a will made by a conveyance to a friend as *trustee* (*c*), if the friend or trustee wished to deny the trust and claim the land for himself, he could get possession of the land from the persons entitled under the will by an action of ejectment at Common Law. But the person entitled under the will could apply to the Court of Chancery, and that Court would grant an *injunction*, preventing the trustee from relying on his rights at common law.

This naturally gave rise to disputes between the Courts of Common Law and Equity. The final dispute arose between Lord Chief Justice Coke and Lord Chancellor Ellesmere, and was decided by James I. in favour of the Chancellor. Consequently the rule of equity prevails and the legal right may be made an empty or bare right with no beneficial enjoyment attached to it.

Thus, if land was granted to one person *in trust* for another, though the *trustee* (*i.e.* "the person trusted") had the *legal estate*, yet the person in whose favour the trust was created or *cestui que trust* (="he for whom is the trust") could enforce the trust against him.

A person for whom land was held in trust had therefore the whole benefit of the fee simple and was said to have *an equitable estate in fee simple.*

*Equitable estates were created* chiefly in cases *where a conveyance at law was impossible.*

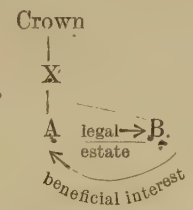
(*b*) This jurisdiction was very similar to that exercised by the prætor in Rome. The prætor could not alter the *jus civile*, but he could modify its effect.

(*c*) See p. 21.

## Examples.

### (1) *To avoid services due to the lord.*

Thus, if A held land of X, who held of the Crown, A could convey his land to B and his heirs "*in trust for*" or "*to the use of*" or "in confidence for" himself (A) and his heirs. Then B held the land at law as tenant in fee simple of X, but he held the benefit of the land in trust for A. Thus—




Hence, if A died without heirs or committed felony, there would be no escheat or forfeiture to X, for escheat and forfeiture were legal rights attached to the legal estate.

### (2) *To convey lands into Mortmain.*

As we have seen, land could not legally be conveyed to corporations. Thus, if A wished to grant lands to a monastery, to get over the difficulty A would convey his land "to B and his heirs to the use of the monastery of ———." B took the legal estate, but the monastery became beneficially entitled (*d*).

### (3) *To make a will.*

As we have seen above (p. 21).

### (4) *To convey land to himself or his wife.*

A man could not convey land to himself, for this was to do nothing, and was therefore useless. And he could not even convey land to himself and another as joint tenants (*e*).

(*d*) This was effectually stopped by Statute 15 Rich. II. c. 5, which made any conveyance to the use of a corporation a cause of forfeiture. This is repealed by the Mortmain and Charitable Uses Act, 1888, but the effect is preserved.

(*e*) This can now be done, without resorting to a use, by s. 50 of the Conveyancing Act, 1881.

Similarly, *a man could not convey land to his wife,* for "husband and wife are one in law," and it was therefore merely a conveyance to himself. Thus, if A wished to convey land to his wife, he conveyed it "to B and his heirs to the use of my wife and her heirs."

In these cases B is called the "feoffee to uses" and the person who gets the use is called "the cestui que use."

(5) *To escape Dower.*

As will appear hereafter, the wife of a tenant in fee simple obtained an indefeasible right to one third of her husband's lands after his death, and this right attached immediately he acquired the land; he could not even sell it, except subject to her right to "*dower.*" Hence, if A (a husband) was buying land, he usually had it conveyed "to B, C, and D and their heirs to the use of A and his heirs."

Dower did not attach to a joint estate, and therefore, if B, C, or D died, their widows did not get dower, and if A died his widow could not claim dower because A had no estate at law.

Thus uses became so common that if A granted land to B, and did not mention any use, it was presumed that B held it for the use of A; this was called a *resulting use.*

*But if B paid purchase money* for the conveyance, it was naturally presumed that B was to have the use himself.

## SECTION II.

### *The Statute of Uses.*

*Equitable estates were disliked by the King and great lords* because they enabled services to be defeated and lands to be conveyed into mortmain.

They therefore obtained the passing of the *Statute of Uses* (27 Hen. VIII. c. 10), the object of which was to destroy equitable estates.

The statute enacted that *whoever had the beneficial use or trust of the land should also take the legal estate*, no matter to whom the legal estate was conveyed by the words of the deed.

It was thus thought that it would be impossible for one person to have the legal estate and another the equitable estate. The first section of the statute, omitting some of the words, was as follows :—

*Statute of Uses.* Sect. I.

" Where any person or persons stand *seised* of any lands to the use, trust, or confidence of any *other* person, persons, *or of any body politic*, all such person, persons, or body politic that have any such use, trust, or confidence, in fee simple *or otherwise*, shall stand and be seised *and deemed in* lawful seisin and *possession* of the same lands of and in such like estates as they had in use, trust, or confidence of or in the same."

In other words, when A holds a freehold in trust for B, for any estate, B's estate shall be the legal estate. Thus, if land is granted to A and his heirs in trust for B and his heirs, B gets the legal estate in fee simple, and A gets nothing.

The immediate result of this statute was to destroy equitable estates ; services could not be avoided, lands could not be granted to corporations or conveyed by will, Dower could not be avoided ; but in case of a grant of land by A to B to the use of his wife, the effect was to vest the *legal* estate in the wife ; thus the statute enabled the legal estate to be conveyed in some cases where it could not be conveyed before.

The Act is one of the most important of all statutes affecting land even at the present day, although it has by no means the same effect as was intended.

Points to note in the Act—

(1) " Where any person shall stand *seised*."

The Act does not apply unless one person is seised, *i.e.* holds a *freehold* in trust for another.

Thus, the statute will not apply if land is granted to B *for* 100 *years* in trust for A for life: B therefore has the legal estate.

(2) "in fee simple or otherwise."

If the person to whom the land is granted has the freehold, the statute will apply, whatever is the nature of the estate in the trust.

Thus, if land is granted to B *for life* (*i.e.* freehold) in trust for A for 100 *years* (leasehold), the statute will apply, and A gets the legal estate for 100 years (if B lives so long).

(3) "any *other* person."

The statute does not apply when a person is seised to the use of *himself*.

Thus, if land is granted "unto A to the use of A," or more shortly, "unto and to the use of A" (*f*), the statute does not apply, and the legal estate passes to A by virtue of the words "*unto* A." The addition of the words "to the use of" simply show that A is to have the use or benefit of the land, and that it is not to "*result*" to the grantor.

(4) "or *body politic*."

A "body politic" means a corporation.

The Statute applies when land is granted *to a person* to the use of a corporation; but *not* where it is granted *to a corporation* to the use of a person.

*E.g.* "to A and his heirs to the use of Cambridge University." The statute applies and the legal estate vests in the university. But, in case of a gift "to Cambridge University to the use of A and his heirs," the statute does not apply, and the legal estate vests in the university in trust for A and his heirs.

(5) "*shall be deemed to be in possession*."

Whenever the statute applies, the person who has the use, not only gets the legal estate, but is deemed

(*f*) This is the usual form of a grant at the present day.

to be in actual possession of the land, although he may never have been near it.

(6) The statute *does not apply to an active trust.*

An "active" or "special" trust is a trust which imposes active duties on the trustees, *i.e.* a trust *to do* something.

Thus if land is granted to B to the use that he shall *collect the rents and profits* and pay them to A, this is an active trust; the statute does not apply, and the legal estate is in B.

*Baker* v. *White* (1875), L. R. 20 Eq. 166.

Land was devised by will to R. Baker and G. Parson and their heirs upon trust "to receive the rents and profits thereof and pay the same unto my son James, *or* to permit him to receive them."

*Held*, (1) if the will means that the trustees are to *collect* the rents and *pay* them to James, the trustees have the legal estate, as it would then be an active trust.

(2) If it means that they are to *let* him take them, James has the legal estate, as it would then be a passive trust.

(3) In a *will* the latter of two alternative directions prevails and therefore the legal estate is in James.

## SECTION III.

### *Equitable Estates since the Statute of Uses.*

*The Statute of Uses failed* in its chief object, namely, *to destroy equitable estates.*

This was due to the decision of the courts of law in

*Jane Tyrrel's Case* (1557), Dyer, 155.

Jane Tyrrel, in consideration of £400 paid by her son G, bargained and sold land to her son G, to the use of herself for life, etc.

Thus there were *two uses*—(i.) the use implied in favour of G under which by reason of his paying the purchase money Jane stood seised to his use (see p. 62).

And (ii.) the use expressed in favour of Jane Tyrrel. The

question was, which of these uses was "executed," *i.e.* turned into the legal estate by the statute.

*Held*, the statute operates on the first use, and any use following upon the first use is *void at law*. Therefore Jane took nothing (*g*).

The effect of this case is often summarised by saying that Tyrrel's case decided that "*there cannot be a use upon a use*" (*h*).

Thus the courts of law again refused to enforce a use or trust which had been declared by the grantor.

The Court of Chancery again stepped in and enforced the second use, holding that the intention must have been that the second use should have some meaning.

Thus it was held in Chancery that if lands were granted "to A to the use of B to the use of C," the first use was intended to pass the *legal* estate by means of the Statute of Uses, and that the second use was meant to pass the beneficial interest or equitable estate.

Thus equitable estates again came into existence and are used largely at the present day. The equitable estate being created by means of two uses or trusts. The first being given to the Trustee, the second to the person to be benefited.

Thus if it is desired to grant land to T as trustee for A, it is granted "to B *to the use* of T *in trust for* A."

The words "use" and "trust" have exactly the same meaning, but it is usual to refer to the first as a "use" and the second as a "trust." The effect of this is that T gets the legal estate by virtue of the Statute of Uses, and A gets nothing *at law*, but equity gives A the equitable estate.

(*g*) But where the legal estate passes to a purchaser by a common law conveyance (*e.g.* a feoffment) or by a statutory conveyance (*e.g.* a deed) the payment of the purchase price does not raise a use if another use is expressed. See *Wilkes* v. *Leuson* (1558), Dyer, 169 *a*.

(*h*) Before the Statute of Uses, where land was Bargained and Sold and the use was expressed to another, the second use was void.

B gets nothing at all—he is merely a "conduit pipe" for the passage to T of the legal estate.

It is usual now to omit the feoffees to uses and grant the land "unto and to the use of T in trust for A," *i.e.* unto T and to the use of T in trust for A. The effect is the same.

*Equitable estates are governed by the same rules* as legal estates with certain exceptions.

Thus it is possible to create equitable estates in fee simple, or in tail, or for life, or years, etc., and the same rules apply; for instance, equitable estates in fee simple descend in the same way as legal estates, and equitable estates tail are barred by deed enrolled.

*Exceptions.*

(1) *Equitable estates in fee simple may be created* or granted by a document *in writing*, and not necessarily by deed.

The writing is required by the Statute of Frauds (see p. 76). The deed is required in case of legal estates by an Act of 1845 (see p. 77). By this Act a conveyance not under seal is *void at law*, but it remains valid *in equity*.

(2) *Words of limitation* are not *absolutely necessary* to convey a fee simple in equitable estates to a beneficiary (*i*).

For although the simple grant of an equitable estate to a person without words of limitation will only give him a life estate, yet if *the deed shows an intention to pass the whole estate of the grantor, to a beneficiary, the whole fee simple will pass.*

*Re Tringham's Trusts*, [1904] 2 Ch. 487.

Copyhold lands were limited to C and T and their heirs in trust for M for life and her husband for life, and after the death of both for the children of the marriage (without the words "and their heirs"), and in default of such issue in trust for other persons.

(*i*) *Re Gillie's Settlement*, [1917] 2 Ch. 205.

*Held*, the gift over on failure of the issue showed a clear intention that the children were to take the fee simple (*k*).

(3) *Escheat.*—At one time, if the tenant in fee simple of an equitable estate died intestate and without heirs, the land remained vested in the trustee free from the trust: but now by the *Intestates' Estates Act*, 1884 (*l*), equitable estates escheat to the lord in the same way as legal estates.

*Burgess* v. *Wheate* (1759), 1 Eden, 177.

B, who held of the Crown, granted land "unto and to the use of Trustees and their heirs in trust for himself (B) and his heirs." B died intestate and without heirs. *Held* (before 1884), the Crown cannot claim the land from the Trustees.

Since 1884 they would hold it in trust for the Crown.

(4) An equitable estate may be destroyed by a conveyance of the land by the person who has the legal estate to another person if that other is a *bonâ fide purchaser without notice* of the trust.

Thus, in the last case, suppose the trustees who had the legal estate during the life of B had sold and conveyed the land to P. The common law courts would have held that P was entitled to the land. Equity, however, would enforce the trust in favour of B against P *if he had notice of it:* for it would be inequitable to allow P to buy a trust estate, and then disregard the trust. But if P when he bought the land had no knowledge of the trust, and no reason to suspect that there was a trust, it would not be equitable to make P carry out the trust. Consequently the following rule now applies in all courts since 1875.

If a trustee having the legal estate conveys the land to a *bonâ fide* purchaser for value who has

(*k*) Followed in *Re Oliver's Settlement*, [1905] 1 Ch. 191; *Re Irwin*, [1904] 2 Ch. 752. Where, however, an equitable estate in land is given to trustees the gift to the *trustees* must contain words of limitation. *Re Monckton's Settlement*, [1913] 2 Ch. 636; *Re Nutt's Settlement*, [1915] 2 Ch. 431.

(*l*) 47 & 48 Vict. c. 71, s. 4.

no notice of the trust, the land is freed from the trust, and the only remedy of the *cestui que trust* is to sue the trustee for damages for breach of trust.

This doctrine only applies where the trustee has the *legal estate.*

A purchaser will be bound by the trust if he has "*Constructive notice*" of the trust.

That is to say, if P did not *know* of the trust, but either knew of some fact which seemed to suggest that there might be a trust and refrained from further inquiry, or did not make the proper investigation of the title, which would have disclosed the trust, he is bound by it (*m*).

*A purchaser is bound by every trust which he would have discovered if he had been both careful and honest.*

## SECTION IV.

### *The Estate of the Trustee.*

*Death of a Trustee.*—On the death of one of several trustees, the legal estate in the land passes to the other trustees.

This is due to the fact that the land is always conveyed to the trustees as "joint tenants" (see p. 51), and consequently on the death of one, the land passes to the others by survivorship.

On the death of sole trustee (or a sole surviving trustee) the legal estate passes to his *personal representatives.*

Before 1881 the legal estate passed in the same way as other estates in fee simple, namely, to the heir of the trustee, or the person to whom he had devised it by his will.

This led to much inconvenience, and now in the case of the

(*m*) Constructive notice is defined by s. 3 of the Conveyancing Act, 1882.

death of a trustee *after 1881*, the land goes to his executors or administrators.

*Transfer of the Trust Estate.*—If the trustees die or wish to retire or remain abroad for more than twelve months, new trustees may be appointed by—

(i.) The persons to whom power to appoint trustees is expressly given by the instrument which created the trust.

(ii.) By the surviving or continuing trustees or the personal representatives of the last surviving trustee.

(iii.) By the Court.

On such an appointment the legal estate may now be transferred to the new trustees without a conveyance, by a declaration made by the person who appoints the new trustee (*n*). This is called a "vesting declaration."

*Exceptions.*—The following cannot be transferred by vesting declaration:—

(i.) Copyholds.

(ii.) Legal estate vested in the trustees as mortgagees.

(iii.) Stocks and shares.

## SECTION V.

### *Different kinds of Trusts.*

*Express Trusts* are trusts expressly declared by the grantor, as in the cases mentioned above; but there are other trusts and uses which are not expressed, namely:—

(1) *Resulting Use.*

This occurs, as we have seen, if land is granted by X "to A," and there is no use expressed, and A pays nothing. The use then results to X; *i.e.* A holds to the use of X.

(*n*) Trustee Act, 1893, s. 10.

Since the Statute of Uses a resulting use carries the *legal estate* back to the grantor.

(2) *Resulting Trust.*

This is similar to a resulting use before the Statute of Uses. It occurs where the *equitable estate* results back to the grantor.

Thus if X grants land "unto and to the use of A in trust" for some purposes which fail, there is a resulting trust in favour of X. That is, A holds the legal estate in trust for X or his heirs.

*Ackroyd* v. *Smithson* (1780), 1 B. C. C. 503; 1 Wh. & T. 68.

A testator gave his real and personal estate to trustees, and directed that it should be sold, and after payment of his debts and certain legacies, the residue should be divided among certain persons, two of whom died before the testator.

*Held*, there was a resulting trust of the shares of these two persons for the testator, and, since he was dead, the trustees must hold the shares on trust, as to so much as was realty, for the heir of the testator, and as to so much as was personalty for his next of kin.

(3) *Implied Trust.*

This occurs where no trust is expressed, but a trust is implied by reason of the position of the parties.

*E.g.* X agrees to sell land to A. Until the land is conveyed, X becomes for some purposes a trustee of the land for A.

(4) *Constructive Trust.*

This is really another form of implied trust and occurs where a trustee obtains any benefit for himself out of the trust: for it is a firm rule of equity that a trustee cannot make any benefit for himself out of a trust—and any benefit so obtained must be held in trust for the *cestui que trust* (*o*).

(*o*) Thus a solicitor who is a trustee cannot charge fees even for professional work unless expressly authorized to do so by the person who creates the trust.

*Keech* v. *Sandford : The Romford Market Case* (1726), 2 Wh. & T. 693.

S held a lease, for a term of years, of Romford Market, in trust for an infant. S applied to the landlord to be allowed to renew (*i.e.* to obtain a further lease on the same terms) for the benefit of the infant. The landlord refused, on the ground that the infant would not be bound by the covenants.

S then applied for a renewal for his own benefit.

The landlord granted the renewal to S.

*Held*, though S had acted perfectly honestly, he was bound to hold the renewed lease as trustee for K, for he had obtained this advantage indirectly by reason of his position as trustee for K.

# CHAPTER X.

## ALIENATION BY CONVEYANCE.

### SECTION I.

### *History of the Form of a Conveyance.*

THE history of a form of a conveyance is a matter of *practical utility* at the present day—for the old forms still appear in many abstracts of title (see p. 260) which have to be considered by practical lawyers.

I. *At Common Law.*

(*a*) *Corporeal hereditaments* could only be conveyed by delivery. They were said to "*lie in livery.*"

A corporeal hereditament is an interest in land in possession (see p. 7). Such an interest could only be transferred by the public delivery of possession.

This was done by *Feoffment with livery of seisin.*

The grantor and the grantee entered on the land and the grantor *handed over possession* to the grantee, generally by giving him a stick or sod of earth from the land, and declared in the presence of witnesses that he granted the land to the grantee *and his heirs.*

This was *livery in deed, i.e.* actual delivery of the land, for both parties went on to the land itself. Whereas in case of *livery in law,* the parties did not go on to the land, but the feoffment took place within sight of the land. This was sufficient if the grantee (or feoffee) entered during the lifetime of the feoffor.

(*b*) *Incorporeal hereditaments* being interests in land not in possession, could not be transferred by delivery of possession; hence from early times they *could be*

*conveyed by deed of grant.* Hence it was said that "Incorporeal hereditaments *lie in grant.*"

Thus if X, the tenant in fee simple, has granted the land to A for life, X has not *possession* of the land; he has merely a reversion; that is, on the death of A, the land will revert to X. If X wished to grant his reversion (*i.e.* his fee simple subject to A's life interest) to B, he could always do so by deed. This was called a "deed of grant," for it was necessary that a deed should contain the word "*grant.*"

A deed is a writing under seal.

Deeds are of two kinds—

1. *Indentures*, where there are two or more parties (or sets of parties).

The deed was then written in duplicate on one piece of parchment, and was cut through the middle with an "indented" or waved edge. Each party retained one part, and the indented edge was proof that the two documents related to each other. The indented edge is still often found, but is a mere formality, and does not correspond with the edge of the duplicate (*if any*). Deeds "*inter partes*" are still called "indentures."

2. *Deeds Poll*, where there was only one party (or one set of parties).

The deed then had a "polled" or straight edge.

A deed is not complete until it has been sealed (*a*) and "delivered."

This delivery may be final, or may be merely conditional.

Where a deed is delivered to a third party so as not to take effect until the happening of a condition, it is called an "escrow."

Deeds are usually signed; but whether this is necessary is still doubtful.

(*a*) It is not necessary that an actual seal should be used, or even that any impression should be made on the paper or parchment, merely touching the deed is sufficient or any act done with the intention of sealing. See "Norton on Deeds" (1906 Edn.), p. 6.

II. *Lease and Release at Common Law.*

Lawyers were always trying to find some method of secret conveyance of corporeal hereditaments. The feoffment was public because it involved

(i.) Actual entry on the land;

(ii.) Presence of witnesses.

A less public form of conveyance was invented by using the doctrine that incorporeal hereditaments could be conveyed by deed. Thus—

The grantor *leased the land to the grantee for one year.* The *grantee entered on the land.* Thereupon the grantor had no longer an interest in possession, but merely a reversion following upon the lease for one year. The grantor then granted or "*released*" *his reversion* to the grantee *by deed.*

Note that this did not avoid the necessity for entry by the grantee. But later, by means of the Statute of Uses, the necessity for entry was evaded, and a means found by which a grantor in London could convey lands in Devonshire without leaving London. The history of this is as follows:—

III. Immediately after the Statute of Uses it would be possible to convey the whole fee simple without publicity and without entry, as follows:—

A wished to grant land to B. A agreed to sell the land to B. B. paid the purchase money. This, it will be remembered, raised a use or implied trust in favour of B; and the Statute of Uses turned this use into the *legal estate in possession.*

Thus a "Bargain and Sale" of land passed the legal estate on payment of the purchase money.

IV. This was prevented in the same year by *The Statute of Enrolments* (27 Hen. VIII. c. 16). Bargains and sales of land of *freehold* or *inheritance* were to be *enrolled* in certain courts within six months; otherwise they should be void (*b*).

(*b*) This statute did not apply to a covenant to stand seised to the use of another in consideration of blood or marriage (see Williams,

This Act once more did away with all secrecy; but it did not apply to leaseholds; and this fact was seized upon by the lawyers as a means of once more inventing a secret conveyance by means of an improved form of lease and release as follows:—

V. *Lease and Release* after the Statute of Enrolments.—A in London wished to convey lands in Devonshire to B. A agreed to sell the land (Bargain and Sale) to B *for one year*. This was not a "Bargain and Sale of Lands of *Freehold*," and therefore need not be enrolled.

B paid 5*s*. This nominal consideration was sufficient to raise a *use* in favour of B for one year, and the Statute of Uses turned this use into the *legal estate in possession*. Thus B *was deemed to be in legal possession of the land for one year*.

This being so, A had no longer an estate *in possession;* he had merely a reversion, which was an incorporeal hereditament and could be conveyed by deed.

Consequently, the next day A by deed *released* his fee simple reversion "to B and his heirs."

B thus acquired the lease and the reversion, *i.e.* the whole fee simple, without entry and without publicity.

VI. By the *Statute of Frauds* (29 Car. II. c. 3, ss. 1–3) all grants of land or any interest in land (except leases for not more than three years at a substantial rent) must be in writing (*c*).

By section 7 of the same statute writing is made necessary for the *creation* of trusts of land, and by section 9 *transfers* of trusts, whether of land or personal property, must be in writing.

Thus equitable estates in land cannot be created or transferred without writing.

R.P., p. 227). Hence, if A, being tenant in fee simple, covenants that he will stand seised of the land to the use of his son, the son gets the legal estate.

(*c*) For the full text of these sections see pp. 301, 302.

By section 4, contracts for the sale of land cannot be enforced unless there is some note or memorandum of the contract in writing and signed by the party to be charged (*i.e.* the person against whom the contract is being enforced) or his agent.

This statute did not materially affect the form of a conveyance; for a lease and release had become the usual form, and both were usually in writing.

*After this Statute*, however, *the lease must be in writing* unless a substantial consideration was paid, namely, at least two-thirds of the best rent obtainable for the year.

A Lease and Release continued to be the usual form of conveyance of freehold land until 1841.

It then at last occurred to the legislature that it was rather ridiculous that every conveyance of land should require *two deeds*, consequently the necessity of the lease was abolished as follows:—

VII. By a *statute of* 1841 (*d*) a *release* alone was made sufficient to convey the fee simple.

The Release stated or "recited" that the lease had been made and then released the reversion.

This fiction of a lease lasted only for four years.

VIII. By the *Real Property Amendment Act*, 1845, *a deed of grant was made sufficient to convey all corporeal estates in land.* So that now "corporeal hereditaments lie in grant as well as livery."

By this Act all interests in land can be and (except leases for not more than three years at a substantial rent) (see p. 301) *must* be conveyed by deed, otherwise the conveyance is *void at law*. *A feoffment* may still be used, but if so *must be evidenced by deed* under this statute.

(*d*) 4 & 5 Vict. c. 21.

## SECTION II.

### *Present Form of a Conveyance.*

The *form of a conveyance at the present day* is still a deed of grant. (See the form on p. 280.)

The form which was in use after 1845 has been shortened in many ways by the *Conveyancing Act*, 1881. For instance—

(i.) The word "grant" is not necessary, the word "convey" or any other words clearly showing the intention, will have the same effect (*e*).

(ii.) It is still necessary to use words of limitation to create a fee simple or a fee tail; but the Act allows the words "*in fee simple*" to be used instead of the words "and his heirs," and the words "*in tail*" to be used instead of the words "the heirs of his body" (*f*).

The only case in which a fee simple may be granted without words of limitation is that of a grant to a corporation: for a corporation has no heirs.

*A corporation aggregate* requires no words of limitation.

*A corporation sole.* The grant should be made to the officer and his successors (*g*).

(iii.) A grant of land carries with it all easements and rights enjoyed with the land (*h*).

Before this enactment "general words," *i.e.* a long list of all sorts of possible appurtenances and rights were expressly set out in the conveyance.

When the land is bounded by a river or a road, the grant (*primâ facie*) includes half the soil of the bed of the river (*i*) or half the soil under the road. See notes (*k*) and (*l*).

(*e*) S. 49 (1).
(*f*) S. 51.
(*g*) See p. 25.
(*h*) S. 6.
(*i*) *Micklethwait* v. *Newlay Bridge Co.*, 33 Ch. D. 133.
(*k*) *Collis* v. *Amphlett*, [1917] W. N. 291.
(*l*) *Central London Railway* v. *City of London Land Tax Commissioners*, [1911] 2 Ch. at pp. 473-474, and cases there cited. The doctrine applies to a private road. *Holmes* v. *Bellingham*, 7 C. B. N. S. 329.

*Registration of Conveyances.*

If the land is in *Middlesex, or Yorkshire,* or in the Bedford Level, any *deed or will or document affecting the land must be entered in a register.*

If the land is in the County of London, the *title to the land* itself must be entered on the register created by the Land Transfer Act, 1897.

(See more fully, Chapter XXXIV., "Registration.")

# CHAPTER XI.

## ALIENATION ON DEATH.

### *Summary of the Present Law.*

*The Legal Estate.*—The legal estate in all property (except copyhold lands and some other similar forms of property) now vests in the personal representatives of the deceased owner. But this rule only applies to real estate if the owner died on or after the 1st of January, 1898.

I. *Death before the 1st of January*, 1898.

(*a*) *Real estate.*—If the tenant in fee simple died intestate, the legal estate passed to his heir; if he made a will, the legal estate passed direct to the person to whom the testator devised it.

*Real estate did not pass to the executor or administrator*, unless it was devised to him by the testator.

Consequently the executor or administrator had no power to deal with land or to sell it, unless power was given to him to do so, either directly, or indirectly (*a*). For the same reason, a will dealing with real estate only could not be proved in the Probate Court.

(*b*) *Personal property*, including leaseholds and other chattels real, *vested in the personal representative*. If the owner died intestate, it did not pass direct to the next of kin, but *vested in the administrator*.

The administrator is the person appointed by the Court to administer the estate if there is no executor. "The court,"

(*a*) As when debts were charged upon the land. See 22 & 23 Vict. c. 35, s. 14.

before 1875, was the Court of Probate; since 1875 is the Probate Division of the High Court.

If the owner made a will and appointed an executor, the personal property *vested in the executor;* it did not go direct to the legatee.

The executor had full power to deal with the personal property, including leaseholds, and to sell it for the purpose of paying the debts of the testator.

II. *Death on or after the* 1*st of January*, 1898.

*The Land Transfer Act*, 1897 (*b*), creates a *real representative*, or rather confers on the personal representative the rights and duties of a real representative. In case of a person *dying on or after the* 1*st of January*, 1898, his real estate *must vest in his executor or administrator* (*c*).

*Section* 1.—"Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, *notwithstanding any testamentary disposition*, devolve to and be vested in his personal representatives . . . *as if it were a chattel real* vesting in them."

*Notes on this Section.*

"*Right to take by survivorship.*"

If land is vested in A and B as joint tenants in fee simple, then, on the death of A, his land goes to B by survivorship. There is nothing left in A and nothing vests in his personal representatives.

"*Notwithstanding any testamentary disposition.*"

The testator cannot make the legal estate vest direct in the devisee, or in any other person except the executor or administrator.

"*As if it were a chattel real.*"

Thus the executor or administrator has now all the powers over real estate which he formerly had over a leasehold, and

(*b*) 60 & 61 Vict. c. 65, s. 1.

(*c*) Until the legal personal representative is constituted the legal estate vests in the heir. *Re Griggs*, [1914] 2 Ch. 547.

he can sell or mortgage it for the payment of the debts of the deceased and for the administration of his estate. But all the executors, if there are more than one, must join in a conveyance of real estate (*d*).

The Act *applies* to land over which the testator had a *general power of appointment* which is exercised by his will (*e*) (see p. 163).

The Act *does not apply to copyholds* or customary estates where surrender to the lord or admission is necessary for a transfer of the legal estate (*f*).

*The executor or administrator holds the legal estate in trust for the person entitled* to it, either under the will or on intestacy.

Thus the Act does not alter the rules of descent or the rules for the construction of wills; and the beneficial interest still passes to the same persons as before the Act, but the legal estate does not pass to the heir or devisee until the personal representative transfers it to him.

As soon as the estate is fully administered, that is to say, when all the funeral expenses, death duties (*g*), debts, and legacies payable out of the land have been paid, the *personal representative must transfer the legal estate to the persons entitled* as follows:—

1. If the tenant in fee simple died intestate, the administrator must *convey* the legal estate to the heir (*h*).

2. If the land is devised by the will to a devisee, the executor (or administrator) can transfer the legal estate to the devisee by merely *assenting to the devise* (*h*).

(*d*) *Re Pawley and London and Provincial Bank*, [1900] 1 Ch. 58.
(*e*) S. 1. (2).
(*f*) S. 1 (4).
(*g*) As to the death duties which are now payable, see Chapter XXXV.
(*h*) S. 3.

This assent need not necessarily be in writing, and it may be presumed to have been given if the devisee takes possession and holds the land for a considerable time. But it is better that the assent should be in writing.

Probate may now be granted of a will dealing with real estate only (*i*).

Where there was a sale under a grant of administration and a will was subsequently discovered, a sale of Real Estate thereunder is valid in favour of a *bonâ fide* purchaser (*k*).

(*i*) S. 1 (3).
(*k*) *Hewson* v. *Shelley*, [1914] 2 Ch. 13.

# CHAPTER XII.

## INTESTACY.

This chapter deals with the descent of the beneficial interest.

### Section I.

### *Freeholds.*

*Rules as to descent* on intestacy apply only to *estates of inheritance,* that is to say, estates in *fee simple* or in *tail,* which go to the heirs.

An estate tail will only descend if the person to whom it was granted leaves issue (descendants) living at his death.

A fee simple will descend whenever the person entitled dies intestate, provided he leaves any relation, however remote.

*The rules of descent of land on intestacy.*

It is generally said that there are ten rules of descent; but many of these are already known to the student or are mere common sense. He should therefore concentrate his attention on the more difficult and unexpected rules, and will thus greatly simplify his task. For instance, every student knows that *land descends to the eldest son.* This statement will be found to contain three rules, namely, rules 2, 3, and 4, see next page.

Rule No. 1 determines whose heir is to be found; the student would naturally expect that when a tenant in fee simple dies intestate the search will be for *his* heir, but by a peculiar rule introduced by the Real Property Inheritance Act, 1833 (*a*),

(*a*) 3 & 4 Will. IV. c. 106.

this is not so; but the person whose heir is to be found is the "last purchaser." Thus the first rule is as follows:—

I. *Inheritance is traced from the last purchaser*, that is the last person who before the death of the tenant in fee simple, acquired the land otherwise than by descent, partition, enclosure or escheat. This is usually the tenant in fee simple himself.

Thus, if A buys land in fee simple or acquires it by will, and dies intestate, the land will descend to A's heir.

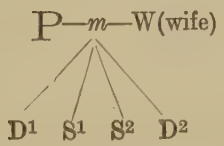
But if A inherited the land from his mother who died intestate, then, on the death of A, the land will go to the person who would be the heir if traced through the mother.

II. The descendants of the purchaser take before any other relations.

III. Males take before females in the same degree.

IV. The eldest male is preferred to the younger males in the same degree.

*E.g.* P, the purchaser, has two sons, $S^1$ and $S^2$, and two daughters, $D^1$ and $D^2$, $D^1$ being the eldest of the family. Thus—




The person who takes the land is, of course, $S^1$. But now suppose that $S^1$ is dead. We now come to a most important rule, namely—

V. *Issue always represent their ancestor.*—That is where any person is dead who would have been entitled as heir if he had lived, his descendants (or one of them) *always* stand in his place.

Thus, if $S^1$ is dead, but left any children or other descendants, one or more of those descendants will take—even though his only descendant is a granddaughter, the child of his deceased daughter, she will take before $S^2$. If, however, $S^1$ is dead without

issue, $S^2$ will take; and if he is dead, his issue; and if he has none, then $D^1$ and $D^2$ will share equally. This is Rule VI.

VI. *Female heirs of the same degree take equally as "Co-parceners."*

"Co-parceners" are in some respects like joint tenants, they have the same unities of interest, title, and possession; but there is no survivorship (*b*).

If $D^1$ is dead, Rule V. applies, and her issue will be entitled to her half share.

Thus if $D^1$ is dead, leaving one son, and $D^2$ is alive, the son of $D^1$ takes half, and $D^2$ takes the other half.

W (the wife), who appears in the diagram, can never be the *heir* of P. She may, however, be entitled to dower of one-third for her life, and possibly to £500 (see p. 91).

Now suppose that all the issue of P are dead, or that he had none—

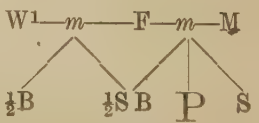
VII. *If there are no descendants the nearest male paternal ancestor takes.*

In other words, you take the nearest male ancestor *on the father's side.* The nearest, of course, is the father himself: if he is dead, then under Rule V., his children or other issue stand in his place.

These will be the brothers and sisters, and possibly the half-brothers and half-sisters, of the purchaser. If so, the order in which they will take is fixed by the first rule as to the relations of the half blood.

Thus, suppose P has no issue, and his father, F, who is now dead, married a first wife, $W^1$, before he married M (the mother of the purchaser, P); F had four children besides P, a son ($\frac{1}{2}$ B) and a daughter ($\frac{1}{2}$ S) by $W^1$, who will be half-brother and half-sister of P and a son (B) and a daughter (S) who will be whole brother and whole sister to P.

Thus—




(*b*) 2 Blackstone, 188.

F, being dead, his children stand in his place, and since in case of real property, the rule is that the whole blood are more nearly related than the half blood, B (being a whole brother of P) will take first, and his issue if he is dead; then S; then the issue of S. Then ½ B or his issue; then ½ S or her issue; *i.e.* when brothers and sisters have the same father but a different mother, the half brothers and sisters take after the whole brothers and sisters and their issue. The rule, therefore, is as follows :—

VIII. *Relations of the half blood.*

(*a*) *When the common ancestor is a male, relations of the half blood take next after the relations of the same degree of the whole blood and their issue.*

This rule applies wherever the relationship arises by reason of a man having married two or more wives, whether that man is a relation on the mother's or the father's side. But it does not apply, where the "common ancestor" is a female, *i.e.* where the relationship arises by reason of a woman having married two husbands. In that case the rule is—

(*b*) *When the common ancestor is a female, relations of the half blood take next after that female.*

This will be explained later (see p. 89).

If the purchaser's father and all the father's issue are dead, you continue up the male paternal ancestors, taking the father's father and his issue; then the grandfather's father and his issue, and so on as far as possible.

Thus, suppose the great-grandfather on the father's side is dead without issue, and it is not known who was the great-great-grandfather, you cannot continue up the *male* paternal line.

Then, by reason of a most peculiar rule, you must find, if possible, the *mother* of the great-grandfather and her heirs.

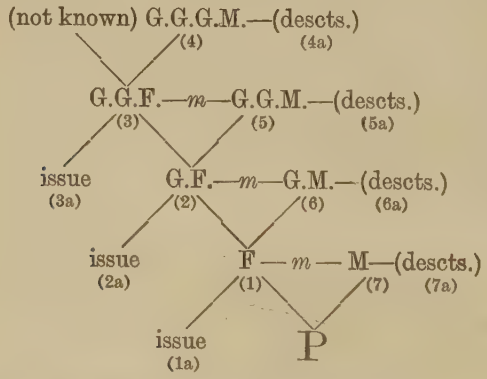
Instead of starting again (as one would expect) with the mother of the purchaser, you must go to

the mother of the most remote male ancestor on the father's side, then the mother of the next remote, and so on, until the *purchaser's own mother and her heirs come last of all.*

The rule is—

IX. The *mother of the more remote male paternal ancestor and her descendants take before the mother of the nearer male paternal ancestors.*

Thus in the following diagram G F stands for grandfather, G G F for great-grandfather, M for mother, etc. The numbers show the order in which they take. 1a comes immediately after 1, etc.




Ancestors take before their descendants, but *not* where such descendant is a nearer ancestor, except that the mother of more remote male ancestor and descendant takes before less remote and her descendant.

Note that when we leave the male paternal line and return by the female paternal line, not only the *issue* of each mother will stand in her place if she is dead, but any of her *heirs.*

Thus a second cousin of the great-great-grandmother on the father's side will take before the purchaser's own mother.

X. *If there are no paternal relations, the mother of the purchaser and her descendants and heirs ascertained as above take.*

To ascertain the heir of the mother, if she is dead, the same rules apply.

Thus her heir will be one or more of her children if she has any. She cannot have any children of the whole blood with the purchaser; for if so, they would have taken the land long before it came to her, but she may have married a second husband, $H^2$, and have had two other children, $\frac{1}{2}$ B and $\frac{1}{2}$ S.

Thus—

If so, the half-brother ($\frac{1}{2}$ B) will stand in the place of the mother, and if he is dead without issue, the half-sister ($\frac{1}{2}$ S) will take.

Thus whenever the inheritance falls to a female ancestor of any kind, and she is dead, her issue, if any, always come next. These cannot be relations of the whole blood with the purchaser, for if they were they would have taken as issue of their father, before the inheritance came to their mother. Thus we get the rule mentioned above, VIII.*b*, that *where the common ancestor is a female, the half blood relations take next after her.*

These rules must be *understood* rather than learnt. Most of them follow common sense, and might be guessed, but there are four rules especially which must be remembered because they are unexpected. They are all rules which were introduced for the first time in 1833, as follows :—

*Changes effected by the Real Property Inheritance Act*, 1833 (*c*).

| *New Law.* | *Old Law.* |
|---|---|
| 1. Inheritance is traced from the last purchaser (*d*). | 1. Inheritance was traced from the person last seised. |
| If a father devises land by will to his eldest son, the statute enacts that the son shall be deemed to take as *purchaser*, not as heir. | This gave rise to some difficulties, as it was necessary in each case to prove possession. |

(*c*) 3 & 4 Will. IV. c. 106. (*d*) S. 2.

| | |
|---|---|
| 2. If there is no issue the male paternal ancestors take (*e*). | 2. Ancestors could not take.<br>The argument was curious, namely, that land is like water, and cannot descend upwards. |
| 3. The mother of the more remote male paternal ancestor and her heirs (*f*) take next after the male paternal ancestors. | 3. Ancestors could not take, but the rule applied to collateral heirs. |
| 4. Relations of the half blood—<br>(*a*) Where the common ancestor is a male, take next after the relations of the same degree of the whole blood and their issue.<br>(*b*) Where the common ancestor is a female, they take next after her (*g*). | 4. Relations of the half blood could not take. |

Rule I. has been modified by another rule introduced by Lord St. Leonard's Act, 1859 (*h*).

*If there is no heir of the last purchaser, inheritance shall be traced from the person last entitled.*

It is difficult at first sight to see how this rule applies, but suppose that P, who bought the land, was illegitimate, and therefore had no legal relations; P marries W, and has one son, S.

(*e*) S. 6.
(*f*) S. 8.
(*g*) S. 9.
(*h*) 22 & 23 Vict. c. 35, s. 19.

P dies intestate: his land descends to his eldest son S, who becomes *entitled* to the land.

S then dies intestate. S is not the last *purchaser*, because he acquired by descent. Therefore we must find the heirs of P. But P has no heirs, so that before 1859 the land would have escheated to the Crown. Now under the 1859 rule we look for the heirs of S, for he was the last person *entitled*. The heir of S will be W, his mother, and her heirs.

*Position of the Widow.*—The widow of a purchaser cannot be his heir. But the widow of any person *entitled* to a fee simple may have certain rights to his land if he died intestate.

(1) *Dower.* If this right has not been barred by the husband, she will get one-third of the land for her life (see p. 129).

(2) *Sometimes* £500.

By the *Intestates' Estates Act*, 1890 (*i*), the widow gets a first charge of £500, payable out of the realty and personalty in proportion to their values, if the husband dies *intestate* and *without issue* after the 1st of September, 1890.

Note that it is an almost *universal error* among students to imagine that a widow is always entitled to £500. But she is not entitled unless three conditions are fulfilled, the most important of which is that there are *no issue*.

The three conditions are—

(1) *The husband must die intestate*, i.e. *wholly without a will* (*k*).

*Re Twigg's Estate*, [1892] 1 Ch. 579.

T gave by will certain legacies and gave the residue of his

(*i*) 53 & 54 Vict. c. 29.

(*k*) Or leaving a will which wholly fails to take effect. *Re Cuffe*, [1908] 2 Ch. 500.

real and personal estate to trustees for his brothers and sisters, all of whom died before T. So that the greater part of the will failed to take effect.

*Held*, T's widow was not entitled to a first charge of £500 out of the residue.

(2) He must die after the 1st of September, 1890.

(3) There must be *no issue*.

The provision is intended to meet the case of a man of small means dying without having made a will. A man who leaves about £500 only, and leaves a widow, but no children, probably would wish the whole to go to his widow, rather than that a distant cousin (perhaps) should share it equally with her. But if he leaves children, he would not want the widow to have all; her one-third share (see p. 93) is then a fair share.

*If the estate is less than* £500 *the widow* (subject to the three conditions above) *will take it all.*

If the estate is greater than £500, she gets a first charge on the real property and on the personal property in proportion to their values; and the value of the property *at the death of the husband* determines the proportions in which it is payable.

*Re Heath*, [1907] 2 Ch. 270.

H died in 1894, intestate, leaving a widow, but no issue. He had assets worth about £10 and also a contingent reversionary interest dependent on the death of L without issue. This interest was valued in 1894 at £388. In 1904 L died without issue, and the interest became worth £3500.

*Held*, the widow of H was entitled to the whole.

*Position of the Husband.*—If the tenant in fee simple is a woman, her husband, if he survives her, will not be her heir; but will be entitled to a life estate in her land under certain conditions (see p. 126).

*Exceptions to the general rules.* Gavelkind lands and Borough English lands descend in a different manner (see pp. 16 and 17).

## SECTION II.

### *Copyholds.*

The rules as to the descent of Copyholds are governed by the customs of the various manors: but if there is no special custom the same rules apply to the beneficial interest as in the case of freeholds.

The rules introduced by the Real Property Inheritance Act, 1833 (see pp. 89, 90), apply, notwithstanding any custom to the contrary, *e.g.* if before 1833 land went to all brothers it now goes to the father.

## SECTION III.

### *Leaseholds.*

Leaseholds being personal property the following rules apply, namely—

*The Rules of succession on intestacy to personal property.*

Personal property goes to the *next of kin* (*i.e.* the nearest in relationship), but among the nearer relations there are some special rules.

*The husband,*

takes all the personalty (see p. 127).

*The widow,*

(1) if there are children, she takes one-third absolutely (not for life as in real property),

(2) if there are no children, she takes

(i.) £500 (or a proportionate part of it) if the conditions stated on pp. 91 and 92 are fulfilled.

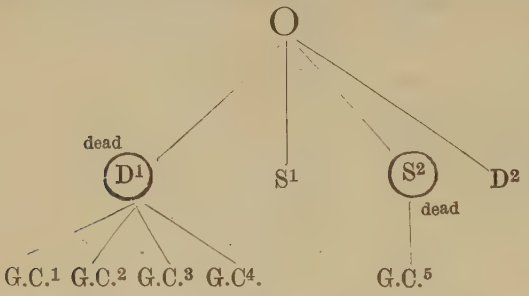
(ii.) half the remaining personal property absolutely.

*Subject to the widow's claims* the personal property goes as follows:—

I. *To descendants "per stirpes"* (*i.e.* by families, or stocks of descent).

There is no preference for male over female, or eldest over youngest. All the children take equally, but if any are dead, all their children stand in their place.

Thus, O (the owner) has four children, two of whom are dead leaving issue (G.C. 1–5—grandchildren of O)



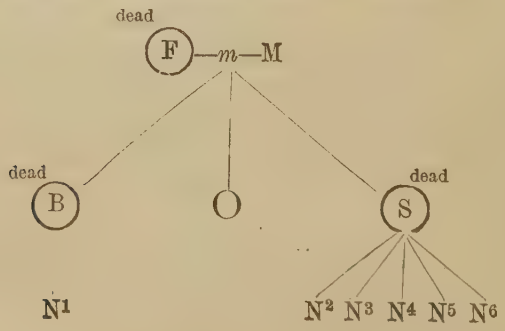

Each child of O forms a *stirps*, or root of descent, *i.e.* the property is divided into four equal parts—

$\frac{1}{4}$ goes equally among the 4 children of $D^1 = \frac{1}{16}$ each ;
$\frac{1}{4}$ goes to $S^1$ ;
$\frac{1}{4}$ goes to the child of $S^2$ ;
$\frac{1}{4}$ goes to $D^2$.

II. *If there is no issue, the father takes all.*

III. *If the father is dead, then the mother and brothers and sisters take in equal shares, and if the mother or any brother or sister is alive, then the children* (but not other issue) *of any brother or sister who has died leaving issue take his or her share.*

Thus, O (the owner) leaves his mother M and 6 nephews and nieces, the children of his brother B and of his sister S.



Here, the *mother being alive*, the *children* of B and S, who are dead, stand in their place. $\frac{1}{3}$ goes to M; $\frac{1}{3}$ to the child of B; $\frac{1}{3}$ to the 5 children of S.

But if B's child ($N^1$) had died leaving two children, these *grandchildren* of B would not take any share.

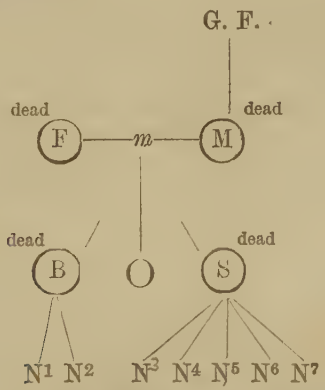
NOTE.—If the mother had been dead this rule would not apply, but the estate would be divided according to the next rule.

IV. If the *mother and the brothers and sisters are all dead, the next of kin take according to their degrees per capita.*

Degrees of relationship are calculated by counting each step up to the common ancestor and then down to the relation in question.

*E.g.* the grandfather of O is in the 2nd degree, the nephews of O are in the 3rd degree.

Thus—




M, B, and S, being all dead, the nearest in relationship takes: *i.e.* the grandfather, G.F.

If G.F. were also dead, the two nephews and the 5 nephews, being in the 3rd degree, would take *per capita: i.e.* by counting *heads*, without regard to families. Thus the 7 nephews would take $\frac{1}{7}$ each.

V. Relations of the half blood take equally with the whole blood.

This is very different from the rule in real estate, and is perhaps the one case in which these rules are not so sensible as the rules of inheritance of real estate.

# CHAPTER XIII.

## WILLS OF LAND.

THIS chapter deals with the alienation by will of the beneficial interest in land (*a*).

The modern law of alienation by will is contained in the *Wills Act of* 1837 (7 Will. IV. & 1 Vict. c. 26).

The main provisions of this Act relating to wills of land are as follows :—

### SECTION I.

### *Rules affecting the Validity of the Will or the Dispositions contained in the Will.*

I. *Form of a Will.*—By s. 9, the will must be *in writing signed by the testator* or by some other person in his presence and by his direction, and such *signature must be made or acknowledged* by the testator *in the presence of two witnesses present at the same time*, and *such witnesses must sign their names in the presence of the testator.*

The Act says that the signature must be "at the foot or end thereof"; but this has been modified by an Act of 1852 (*b*), and now the signature may be almost anywhere in the will, except that nothing which follows the signature, or which is written in after the signature, is valid.

(*a*) The legal estate cannot be given by will to any person other than the personal representatives (see p. 81).

(*b*) 15 & 16 Vict. c. 24.

Note that there must be *two* witnesses and they must be *both* present at the same time when the signature is made or acknowledged by the testator.

But suppose that after this has been done, one of the witnesses signs his name and leaves the room, so that the other witness does not sign in *his* presence. The words of the statute seem to show that this would be sufficient, provided it is done in the *presence of the testator*. (And see *Faulds* v. *Jackson* (1845), 6 N. of C. Supp. 1.)

This decision has been doubted by some on the ground that "such witnesses" may mean "witnesses present at the same time," and it is therefore usual and better that both witnesses should be present both when the will is signed and when the witnesses sign.

No document can be admitted as a valid will unless it complies with these formalities, even though it is written throughout by the testator himself. This is called a "*holograph*" will.

*Exception:* Wills dealing with personal property made by soldiers on actual military service and sailors at sea may be made in almost any form intended to operate as a will (*c*).

*In the Goods of Scott*, [1903] P. 243.

S, who had volunteered for service in South Africa, dictated the following words to the sergeant-major:—"In the event of my death in South Africa, I desire all my effects to be credited to my sister, Miss N. Scott." The document was not signed.

*Held:* The will was valid.

This privilege is now extended also to wills dealing with Real Property after the 6th of February 1918 (*cc*).

Before 1837 three witnesses were necessary by the Statute of Frauds.

II. *Revocation of a Will.*—A will may be revoked in any one of five ways.

1. *By a subsequent will.*—The new will need not necessarily contain an express revocation of previous wills, provided it clearly deals with the whole property.

(*c*) S. 11. (*cc*) Wills (Soldiers and Sailors) Act, 1918, s. 3 (1).

2. *By a codicil.*—A codicil is a document executed in the same manner as a will and is usually attached to an existing will for the purpose of modifying its provisions. The codicil may revoke all or any part of the will, but it is held not to revoke the will more than is necessary.

3. *A deed or writing executed in the same way as a will.*—If a testator writes on his will or on a separate paper a statement that he revokes his will, this is sufficient, provided it is signed by him and attested by two witnesses as required by the Act.

4. *By marriage* (*d*).—The marriage of a testator gives rise to quite a different set of moral obligations, and it is thought fairer for the wife and children that the law of intestacy should apply rather than the old will, if the testator should omit to make a new will after his marriage.

This rule does not apply in so far as the will merely executes a power of appointment over property which could not go to the wife or children in case the power was not exercised (*d*).

Thus, if lands have been given to such of the nephews of A as he should name in his will, and A makes a will before marriage directing a division of the land among the nephews, this direction remains valid; for it would do no good to A's wife or children to declare it void.

Before the Act, marriage alone did not revoke a will, but marriage and birth of issue after the making of the will did revoke it.

5. *By destruction with intention to revoke* (*e*) (*animo revocandi*).

(1) If there is no intention to revoke, *mere destruction does not revoke a will.*

(*d*) S. 18. (*e*) S. 20.

*Sugden* v. *Lord St. Leonards* (1876), 1 P. D. 154.

Lord S kept his will in a box of which there were several keys. His daughter frequently read it through, and he made several alterations and additions to it. On his death the will had disappeared. It was clear that the testator had at any rate shortly before his death, *no intention of revoking it*, even if it had been destroyed by him (which was not proved).

*Held*, the will was valid, and might be proved by the daughter reciting it from memory.

(2) *Intention to revoke* without actual destruction *does not* revoke a will.

*Cheese* v. *Lovejoy* (1877), 2 P. D. 251.

A testator wrote across his will "this is revoked," and threw it into the waste-paper basket. The housemaid, thinking it an interesting document, did not destroy it, and it was found on the kitchen table after the testator's death.

*Held*, the will was not revoked.

The intention to revoke may be *conditional*. Then there is no revocation unless the condition is fulfilled.

*Dixon* v. *Solicitor to the Treasury*, [1905] P. 42.

A testator sent instructions to his solicitors to prepare a new will, and tore off and destroyed the signature to the old will, because he thought it was necessary to destroy the old will before he could make a new one. The testator died before the new will was made.

*Held:* He only intended to destroy it *if the new one should be made*, and the first will remained valid.

III. *If a will which revokes a former will is itself revoked, the earlier will does not revive* (*f*).

If a will is revoked it becomes void, and cannot again become valid, unless it is re-executed as a will or incorporated into a new will.

IV. *Effect of a gift to a witness.*—The gift is void, but the witness remains a good witness.

(*f*) S. 22.

(*a*) *Before the Act*, if any person to whom anything was given by the will, signed it as a witness, his signature was useless, for his evidence was bad. The same rule applied if the gift was to the husband or wife of any witness.

The result of this was frequently to upset the will altogether; for if there were only three witnesses, and a legacy was given to one of them or to his wife, there were not sufficient witnesses to prove the will, since the Statute of Frauds required three witnesses.

(*b*) An Act of George II. (*g*), intending to remedy this, enacted that in case of a gift to a witness, the *gift should be void*, but the *evidence of the witness should be good.*

This statute did not refer to a gift to the husband or wife of a witness, and therefore this curious result followed: that a gift to a witness himself did not destroy his evidence; but a gift to his wife did, and might make the whole will void (*h*). This is now remedied.

(*c*) By the Wills Act, 1837, s. 15. *A gift to a witness or the husband or wife of a witness is void;* but the evidence of the witness is good.

A witness to a will cannot therefore take any benefit under the will, *e.g.*

*Re Pooley* (1888), 40 Ch. D. 1.

J, by will, appointed P one of her executors. P was a solicitor, and the will gave him power to charge for professional work done as solicitor. P witnessed the will.

*Held*, the power to charge being a power which the solicitor would not have had unless expressly given him by the will (see p. 71, note) was a gift, and was therefore void. Therefore P could not charge for work done.

V. *Lapse.*—When land is devised by will to a person, and that person dies before the testator, the gift fails, and is said to *lapse.*

(*g*) 25 Geo. II. c. 6.
(*h*) *Hatfield* v. *Thorp* (1822), 5 B. & Ald. 589.

As a general rule, *a lapsed devise falls into residue.* Thus, A by will gives "my land in Surrey" to B, and gives "all the residue of my real and personal estate to C"; if B dies before A, the land in Surrey becomes part of the residue and goes to C.

The same rule applies even if the land is devised "to B and his heirs."

*Exceptions.*

(A) Where there is no lapse at all.

(1) *Gift of an estate tail* (*i*).—If the devisee takes *an estate tail* and dies before the testator, leaving issue, who survive the testator, and who could inherit under the entail, there is no lapse.

(2) *Gifts to children* (*j*).—If the devisee is *a child* or other issue of *the testator*, who dies before the testator, but leaves issue who survive the testator, there is no lapse.

In both these cases the *devisee is deemed to have died immediately after the testator.*

*Eager* v. *Furnival* (1881), 17 Ch. D. 115.

F devised land to his daughter Grace. Grace died. Then F died. Grace left an only child, who was living at the death of F, and the husband of Grace was also alive.

*Held*, Grace must be deemed to have died immediately after F. If she had done so, she would have become entitled to a fee simple in possession, and her husband would have been entitled to curtesy (see p. 126), *i.e.* an estate for life.

*Held*, therefore that land goes to the husband for life, and after his death to the child of Grace (*k*).

There are, however, some *cases in which a child*

(*i*) S. 32.

(*j*) S. 33.

(*k*) (*Note on second reading.* It was also argued that the husband could not be entitled to curtesy as his wife was not "seised in deed," but *held* that this was impossible under the circumstances and "lex non cogit ad impossibilia.")

*of the testator who dies before the testator will lose the devise.*

These, being exceptions to the above exception, at first sight make the question very complicated; but they are really mere common sense, and should cause no difficulty if understood.

(i.) If the land is devised to the testator's children A, B, and C *as joint tenants.*

In this case, if A should die after the testator, his share would go to B and C, consequently the same result will occur if A dies before the testator.

(ii.) Where the land is devised to children *as a class, e.g.* "to all my children." This is *primâ facie* taken to mean "all my children living at my death." Therefore, if any child dies before the testator, he will not take under this gift.

(iii.) Where the testator devises land to his children by reason of a *special power to devise lands to his children* only (*l*).

(B) Where the devise lapses, but the land does not fall into residue. The rule is that *a lapsed share of residue does not fall into residue* (*m*).

Thus, if a testator gives various legacies and devises his dwelling-house to X., and then says, "I devise all the residue of my land to A and B in equal shares." This is equivalent to saying, "I give half my residue to A and half to B." Therefore, if A dies before B, B will not get the whole residue; but it will go to the heir of the testator as if he had died intestate.

(*l*) *Holyland* v. *Lewin* (1883), 26 Ch. D. 266. In this case it was held that the words "devised or bequeathed" in s. 33 of the Wills Act (for the text of which see p. 308) did not refer to an appointment under a special power.

(*m*) *Re Mary Wood* (1861), 29 Beav. 236; *Ackroyd* v. *Smithson* (1780), 1 Bro. C. C. 503.

## SECTION II.

### *Rules as to Construction.*

All rules of *construction* (*i.e.* for determining the meaning of wills) under the Act are subject to the exception "unless a contrary intention appears in the will."

The object of the Act is to ensure, as far as possible, that the intention of the testator shall prevail. The intention to which the courts give effect is, *his intention as expressed in his written words*, and the court will not listen to evidence which is intended to prove that, though the testator said one thing, he meant another; nor will it make guesses at what the testator *meant to say*.

Further, for the guidance of persons who are drawing wills, and wish to make the intention absolutely clear, there are certain fixed rules of construction of particular words and phrases, and these will not be departed from, except on very strong expressions of a contrary intention.

*Cunliffe* v. *Branker* (1876), 3 Ch. D. 393.

A testator gave land "unto my trustees to the use of A for his life with remainder to the use of such of the children of A as shall be living at the death of A and his wife."

*Held*, the testator had used a legal phrase, "to the use of," and this must receive its legal meaning, and therefore the *legal estate* vested in the son for life with a legal remainder to the children if they should survive both A and his wife (*n*).

But evidence of the circumstances of the family of the testator, and of the facts when he made his will may show that the testator used words in a peculiar sense.

(*n*) (*Note on second reading.* This construction was adopted, although the result was to destroy the gift to the children of A. See the same case on p. 158). This case also shows that, although the Statute of Uses does not necessarily apply to a gift of lands by will, the statute will be applied to them, if technical words are used.)

Evidence of intention may be allowed where there is a latent ambiguity (*o*).

*Dowset* v. *Sweet* (1753), Ambler, 175.

The testator gave property "to John and Benedict, sons of John Sweet." John Sweet had no son named John, but he had a son named James.

Evidence was allowed to be given that the testator used to call this son "Jackey."

I. *A devise of land without words of limitation passes the fee simple or*, if the testator has not got the fee simple, then *the whole of the testator's estate in the land* (*p*).

It is not now necessary *in a will* to give land "to A and his heirs," or "A" in fee simple: if you wish to give him the fee simple, a gift "to A" is sufficient. Before the Wills Act a gift to A gave a life estate only, but to A "for ever" (*q*), or "my estate" to A gave the fee simple.

II. *A devise of "all my land"* includes freeholds, leaseholds, and copyholds (*r*).

Before the Act a gift of "land" did not include leaseholds, for they were personal estate. If, however, the testator had no freehold land it was obvious that he intended the leaseholds to pass, and they were held to be included in the gift.

III. A devise of "*all my land*" *includes all the land* which the testator has *at his death.*

By s. 24. The will *speaks from death with reference to the property comprised in it.*

(*a*) *Before* 1837 a will spoke from the time of making, as regards freehold lands.

Thus a gift of "all my lands" passed only the lands which the testator had when he made his will. If he acquired other

(*o*) *Re Jeffery*, [1913] W. N. 339.
(*p*) S. 28.
(*q*) *Idle* v. *Cooke* (1703), 2 Ld Raymond, 1151.
(*r*) S. 26.

land afterwards, he must make a new will (or re-publish the old one), otherwise the newly acquired land would go to his heir.

(*b*) *By the Act.* All land acquired after the will is made, is included in a gift of "all my lands"; but any land which is sold or disposed of before the testator's death, is of course not included. At Common Law there was no power to make a Will of Estates in land greater than a terms of years (*s*). And the power to make a will of land was only conferred by the Statute of Wills on "every person having land." This was construed to extend only to lands of which he was possessed (*Butler and Baker's Case*, 3 Co. Rep. 30); but personalty (including for this purpose chattels real) (Williams, p. 20) could always be disposed of and passed if acquired before death (*t*).

"*With reference to the property comprised therein:*"

The will does not speak from death for all purposes. Thus for the purpose of ascertaining the intention of the testator as to the persons named in the will, the circumstances *when he made the will* should be regarded.

*Re Whorwood* (1886), 34 Ch. D. 446.

The testator gave "to Lord Sherborne my Oliver Cromwell cup as an heirloom." The person who was Lord Sherborne at the date of the will died before the testator, and another person succeeded to the title.

*Held*, the gift was to the person who was Lord Sherborne at the *date of the will*, and the legacy lapsed.

IV. A devise of "*all my land*" *includes* land which does not belong to the testator, provided he has *an absolute power to dispose of it by will* (*u*).

It is possible to give to A a power or authority to give certain land to any one by his will, or by deed, without giving to A any estate or interest in the land itself. This is called a *general*

(*s*) Blackstone, II., p. 374. (*t*) Jarman, 6th ed., p. 1046.
(*u*) S. 27.

*power* (see p. 163). A testator would often consider that this land was really his, but before the Act a devise of "all my land" would not amount to a gift of the land under the power, because the land did not belong to the testator; but now—

*A general devise operates as an exercise of a general power of appointment.*

The devise or bequest must be of a *general* nature.

*Re Jacob*, [1907] 1 Ch. 445.

The testatrix had a general power of appointment over some bank shares. By her will she gave "all stocks shares and securities which I possess or to which I am entitled" to her sisters.

*Held*, the power of appointment was well exercised.

If the power is *special*, *e.g.*, limited to *children*, it will not be exercised unless it is specially referred to.

V. Construction of a gift "*to A, but if he shall die without issue, then to B.*"

The meaning of this gift seems clear—namely, that A is to take the fee simple, but if on his death he leaves no children or issue, then B is to have the fee simple. But this was not the construction before the Act.

(*a*) *Before* 1837, this gift was construed to mean that if A died leaving no issue at his death, *or* if his *issue failed after his death*, the land was to go to B. And it was held therefore that A had an *estate tail*, which he could bar.

(*b*) *By the Wills Act*, the natural construction is to be followed, and *B takes, if A leaves no issue living at his death* (*x*).

This rule has been again altered, for it was found very inconvenient that A should not know until the moment of his death whether he had a fee simple, or whether all his children would die before him, and thus cut down his estate to a life estate. Consequently—

(*x*) S. 29.

(c) *By the Conveyancing Act*, 1882 (*y*), s. 10, *if any child or issue of A*, on failure of whom the gift over is to take effect, *reaches* 21 *during the life of A, the gift over to B fails* and A takes an absolute interest.

This is a curious rule which overthrows the testator's intention for the sake of convenience. It should be carefully remembered as it stands by itself and is sometimes overlooked in practice. The full text of this section is given on p. 320.

## SECTION III.

### *Life Estate by Implication.*

A rule of construction not depending on the statute may sometimes give a life estate to a person to whom nothing is expressly given by the will.

This construction is only adopted where no other construction is possible.

Thus. If T gives land by will "*to John after the death of my wife.*" There is no gift of the land *during the life of the wife.* The land is therefore undisposed of and *goes to T's heir*, for although one might think that the testator meant his wife to have it, the rule is that the heir cannot be displaced except by express words or *necessary* implication. But, *if John is the testator's heir*, it was clearly intended that John (the heir) was not to take until after the death of the wife, and if the heir is not to take it, it must be intended that the wife is to have it for life. Hence *the wife takes a life estate by implication.* The rule, therefore, is—

If a testator gives land *to his heir*, after the death of a named person, that person takes a life estate by implication.

The rule does not apply where the land is given to

(*y*) 45 & 46 Vict. c. 39.

*one of several* co-heiresses after the death of a certain person.

*Re Willatts*, [1905] 1 Ch. 378.

A testator gave his residue after the death of his wife to his two daughters Eliza and Emma. The testator had three other daughters; so that the five daughters were co-heiresses.

*Held*, the wife did not take a life interest in the residue (*z*).

The rule can apply to a Deed (*a*).

(*z*) This case was overruled (S. C., [1905] 2 Ch. 135), but on other grounds

(*a*) *Re Stanley's Settlement*, [1916] 2 Ch. 50.

## CHAPTER XIV.

### ALIENATION FOR DEBT.

If a tenant of land owes debts to other persons, it is of course always in his power to sell whatever interest he has and to pay the debts out of the proceeds.

If, however, the tenant does not wish to sell his land for this purpose, the creditors have power in certain cases to take the lands against the wish of the tenant.

*A creditor can only seize the lands of the tenant or require them to be sold, if*

(i.) he has sued the tenant for the debt and obtained *judgment* (*a*), or

(ii.) the tenant has become *bankrupt*, or

(iii.) the tenant *dies*.

*The creditors cannot be deprived of their rights against the land* in these three cases. And therefore, if land is conveyed to a tenant with a proviso that it is not to be liable for his debts, the proviso is void.

But the creditors can only seize the interest or estate of the tenant, whatever it may be: thus, if land is conveyed to a tenant *until* a judgment is given against him, or *until* he becomes bankrupt, the interest of the tenant ceases immediately the rights of the creditors commence, and they therefore get nothing.

(*a*) A debt due to the Crown created a charge on the land itself but now a writ of judgment must be registered in the Land Registry See Williams, R.P., 23rd ed., p. 287.

Thus, in a marriage settlement, if the husband is a spendthrift, land is often granted to him "for his life or until he shall become bankrupt, etc." But the husband cannot settle his own lands upon himself in this manner.

## SECTION I.

*Liability of land for debt during the life of the tenant.*

(A) *Judgment debts.*—A person to whom the tenant owes money cannot seize his lands until he has sued the tenant and the Court has given judgment in his favour against the tenant. He then becomes a judgment creditor.

*A judgment creditor may obtain the issue of a "writ of elegit,"* and thereby obtain possession of the land.

*History of the writ.*

(i.) At common law the creditor could not seize the land of the tenant who owed him money, but could only seize his *chattels* by writ of *fieri facias.*

(ii.) By a Statute of Edward I. (*b*), the creditor was allowed to seize the chattels of the tenant (except oxen and beasts of plough) and *half the land.* If he chose to claim against the land in this way, he issued the writ of *elegit* (= "he has chosen").

(iii.) By the Judgments Act, 1838 (*c*), the creditor can take the *whole* land (*d*).

*Form of the writ* (*e*).—The writ is issued to the sheriff commanding him to hold an inquiry by means of a jury as to what lands the tenant holds in his bailiwick.

The verdict of the jury is put into writing and signed by the sheriff: this is called the "*return to the writ.*"

(*b*) 13 Edw. I. c. 18.
(*c*) 1 & 2 Vict. c. 110.
(*d*) For the history of this writ see Williams, "Real Property," 23rd ed., p. 288.
(*e*) See further Goodeve, "Real Property," 5th ed., p. 373.

As soon as the "return to the writ" is complete, the creditor is deemed to be in possession of the land.

A judgment creditor who is in possession of the land under a writ of elegit is said to have *an estate by elegit*. He can take possession of the land or sell it under an order of the Court (*f*).

This estate is a chattel real.

*The writ must be registered.*

This was first required by the Judgments Act, 1838, and is now governed by the Land Charges Act, 1900. The writ must be registered in the Office of Land Registry (see p. 287), and must be renewed every five years (*g*).

*If the writ is not registered it is void as against a bonâ fide purchaser for value* from the tenant if the purchaser had *no notice* of the writ.

Thus, if A is tenant in fee simple of land, and owes £1000 to B, B obtains a judgment against A, and issues a writ of elegit. After the "return to the writ" is signed, A sells his land to C, who pays £1200 for it, and knows nothing of the judgment in favour of B. C makes the proper searches in the Land Registry, and there is no entry of B's writ. C takes the land free from B's claims.

*Any estate in land may be seized by writ of elegit* including leaseholds: but goods cannot now be taken under this writ (*h*). An estate subject to a mortgage or not in possession cannot be seized. The writ operates as a charge on the land as from the date of registration (*i*). If an *estate tail* is seized by a creditor in this way, the *rights of the creditor are good as against the issue* of the tenant in tail, but do not bind the persons entitled to the fee simple in remainder until the estate tail is barred (*k*).

(*f*) 27 & 28 Vict. c. 112 & R.S.C.O. 55, r. 9 B.

(*g*) See Land Charges Act, 1900, 63 & 64 Vict. c. 26, and the Land Charges Act of 1888, 51 & 52 Vict. c. 51, ss. 5 and 6.

(*h*) Bankruptcy Act, 1883, 46 & 47 Vict. c. 52, s. 146.

(*i*) *Lord Ashburton* v. *Nocton*, [1915] 1 Ch. 274.

(*k*) See *Anthony* v. *Anthony*, [1893] 3 Ch. 498.

(B) *Secured debts* (see Mortgages, Chapter XXIX.).—If the tenant has mortgaged or charged his land to secure the payment of a debt, the creditor often (*l*) has—

(i.) *A power to sell* the land, and pay the debt out of the proceeds, And

(ii.) a power *to appoint a receiver.*

A receiver is a person appointed by the creditor (or in some cases by the Court) *to receive the rents and profits* of the land, that is, to receive the *income*, as distinct from the land itself. He receives the income as agent of the debtor (or as an officer of the Court), and his duty is to pay the interest on the debt, and sometimes the debt itself, out of the income, and to pay the balance of the income to the debtor.

A receiver may also be appointed by the Court *as a means of enforcing a judgment debt.*

A receiver appointed for the purpose of paying off a judgment debt is called "*a receiver by way of equitable execution.*" He is not usually appointed if there is any other way of enforcing the judgment (*m*).

(C) *Bankruptcy* (*n*).—If a tenant of land owes debts to the extent of £50 or more, any creditor or creditors may petition the Court to have him declared bankrupt, but only if—

(1) The tenant owes to the petitioning creditors *at least* £50,

And (2) The debt is a "*liquidated*" or ascertained amount, and is not a contingent or future debt,

And (3) the tenant has done some act which is declared to be an "*act of bankruptcy*" by the bankruptcy Acts (*o*).

(*l*) See pp. 227, 228.
(*m*) *Goldschmidt* v. *Oberrheinische Metallwerke*, [1906] 1 K. B. 373.
(*n*) This question is dealt with only so far as concerns land.
(*o*) Bankruptcy Act, 1883, s. 6.

Acts of bankruptcy are now defined by s. 4 of the Bankruptcy Act, 1883, and include, among other things, any fraudulent dealing with property, or fraudulent payment of one creditor in preference to other creditors, or if the goods of the tenant are seized and sold under a writ of *fieri facias*, or if he fraudulently evades his creditors or leaves the country for that purpose.

The tenant may himself petition to be made bankrupt.

A petition is often filed by a person who is being worried by the pressure of his creditors.

When the petition is presented, the Court makes a receiving order.

The effect of a receiving order is to vest all the property of the debtor in the Official Receiver, an officer of the Court. The creditors then meet, and appoint a trustee to look after their interests, who is called the trustee in bankruptcy, and whose duty is to sell the property of the bankrupt and divide the proceeds among the creditors.

On the appointment of a trustee *all the land of the bankrupt tenant vests in his trustee in bankruptcy.*

The legal estate passes out of the tenant, and goes to the trustee for the whole estate of the tenant whatever it may be, and the trustee can sell and convey both the legal and equitable estate.

*The trustee in bankruptcy takes the whole estate or interest of the tenant and no more.*

*Exceptions.*

(1) Interests in land which *belong to the bankrupt tenant*, but *do not* vest in the trustee in bankruptcy. These are all estates which the bankrupt tenant holds *as trustee for another.*

These strictly belong to the bankrupt at law, but they are not affected by his bankruptcy; not even the legal estate passes to the trustee in bankruptcy.

(2) Interests in land which *do not belong to the bankrupt* tenant, and *yet do vest in the trustee in bankruptcy*.

(i.) *Estates Tail.*—Not only does the life interest of the tenant vest in the trustee, but also the interests of the issue; *the trustee in bankruptcy* thus gets a base fee and he also gets a special power to *bar the entail* for the benefit of the creditors, provided the tenant does not die before being adjudicated bankrupt.

Thus the trustee in bankruptcy can, by barring the entail, sell the whole fee simple.

(ii.) *Land over which the bankrupt tenant had a general power of appointment* which he could exercise for his own benefit.

As we have seen (p. 105), a power may be given to A to give land to any one he pleases, without giving A any estate or interest in the land. This power generally enables A to give the fee simple to himself. If so, A's trustee in bankruptcy can exercise this power and give the fee simple to himself or sell it for the benefit of the creditors.

(iii.) *Land which the tenant has conveyed to others, in the following cases:—*

(*a*) *Voluntary Conveyances*, or *gifts of land* without consideration.

*By the Bankruptcy Act*, 1883 (s. 47).

(*α*) If the tenant becomes bankrupt within *two years* after a voluntary conveyance, the conveyance is *void*.

(*β*) If he becomes bankrupt within *ten years* after a voluntary conveyance, the conveyance is *void unless* it can be shown that at the time of the conveyance *he could have paid all his debts* as they fell due, *without the aid of the land conveyed*.

The following is an unreported case. In December, 1900, A, who was then a wealthy man with few debts, bought a farm

in Canada for his son. In 1902 A was ruined by the fraud of his manager, and was declared bankrupt in August, 1902. The farm which had been given to the son vested in A's trustee in bankruptcy and was sold for the benefit of A's creditors.

*Note*, If A had become bankrupt in 1903 the son could have kept the farm, because A could have paid all his debts in 1900.

(*b*) *Conveyances for value.*

By a *statute of* 13 *Elizabeth* (*p*) *a conveyance of land or goods whether for value or not, if made fraudulently for the purpose of defrauding creditors is void, unless the conveyance was made to a bonâ fide purchaser for value who had no notice of the fraud* (*q*).

Thus, if in the last example A had conveyed the farm to his son for say £50, it would probably not have been void as a *voluntary* conveyance under the Bankruptcy Act; but the smallness of the consideration might have been evidence of an intention to defraud A's creditors, and, if so, the conveyance would have been void under the statute of 13 Elizabeth.

These statutes must not be confused with *the statute of* 27 *Elizabeth* (*r*). By this statute *a voluntary conveyance of land* (*not goods*) *was void if the grantor afterwards conveyed the same land to a purchaser for value.*

Under this statute the voluntary conveyance was void, even though it was not fraudulent at the time, and even though the subsequent purchaser had notice of it.

*Buckle* v. *Mitchell* (1812), 18 Ves. 100.

In 1793 P conveyed a rectory on trusts for his sister and her children. In 1810 P agreed to sell the rectory to B for £7000. B knew of the deed of 1793.

*Held*, B is entitled to specific performance of the agreement to sell the rectory to him.

This absurd rule is no longer law.

(*p*) c. 5.

(*q*) *Pearce* v. *Bulteel*, [1916] 2 Ch. 544.

(*r*) c. 4.

*By the Voluntary Conveyances Act*, 1893 (*s*), a voluntary conveyance cannot be made void under the Act unless it was made "*with fraudulent intent.*"

This statute applies to all conveyances whether made before or after the Act.

The result now is that (1) a *purchaser* can get relief against a *voluntary* conveyance (under 27 Elizabeth), and (2) a *creditor* can get relief against *any* conveyance for value (under 13 Elizabeth), but in both cases only if he is intentionally defrauded, and subject in both cases to rights of *bonâ fide* purchasers for value.

## SECTION II.

### *On the Death of the Tenant.*

On the death of a tenant in fee simple *any person who takes any beneficial interest in the land*, either under a will or as heir; *takes it subject to the debts* of the tenant, until they have all been paid.

The personal representatives ought to pay the debts out of the personal property first, but a creditor is not bound by this rule and can claim against any of the property of the deceased tenant.

*This rule does not apply to an estate tail*, for on the death of a tenant in tail, the land descends to the next person entitled under the entail, free from the debts of the first tenant.

If the tenant in tail or his trustee in bankruptcy had barred the entail during his life, he would of course no longer be a tenant in tail but a tenant in fee simple, and the land would be subject to his debts.

On the death of a tenant for life, his estate ceases, and the land is not subject to his debts.

The rule *applies to leaseholds* (which, being personal property, have always been subject to the debts of the

(*s*) 56 & 57 Vict. c. 21, s. 2.

tenant), and to all lands over which the deceased had a *general power of appointment which he has exercised* by his will.

Land over which the deceased has exercised a general power of appointment is the last fund resorted to for the payment of his debts.

*History of the rule* that the lands of a tenant in fee simple are subject to his debts on his death (*t*)—

(i.) *At Common Law.*—The land descended to the heir, but he was bound to pay the debts (to the extent of the value of the land) if the chattels were not sufficient (*u*).

(ii.) *By a later rule* created by the feudal system, *the heir was only bound by debts which were contracted under seal*, which were called "*specialty debts.*" All other debts were called "simple contract debts," and were not binding on the heir.

(iii.) *Equity.*—The common law courts always disregarded wills of land, consequently such wills were administered and carried into effect by the Court of Chancery. *If, therefore, the tenant in fee simple devised his lands by will to trustees to pay his debts,* Chancery carried out this trust. The principle of the Court of Chancery in these cases was that "equality is equity," and, therefore, *all the debts were paid equally, i.e.* "specialty" and "simple contract debts" were paid proportionately (*pari passu*) out of the land. Land thus devised was called "Equitable Assets."

(iv.) *By an Act of* 1807 (*x*), the lands of *traders* could be taken to pay any of their debts.

(v.) *By an Act of* 1833 (*y*), this was extended to all persons whether traders or not; and the heir or devisee is thus rendered liable for the debts to the

(*t*) For a full statement of this history of the rule see Williams, "Real Property," 23rd ed., p. 302.

(*u*) If the devisee has *bonâ fide* alienated the land, the creditors cannot claim against it. *Re Atkinson,* [1908] 2 Ch. 307.

(*x*) 47 Geo. III. c. 74.

(*y*) 3 & 4 Will. IV. c. 104.

extent of the value of the land if he has alienated it (*z*), but under these Acts "*specialty debts*" *were paid first*, unless the land had been devised to trustees and made "equitable assets."

(vi.) *By Hinde Palmer's Act*, 1869, s. 1, "*specialty*" *and* "*simple contract debts*" *were put on the same footing.* They are now paid *pari passu*, and there is no difference for the purpose of administration between the two kinds of debts (*a*).

The text of this section is set out on p. 309.

This applies to cases where the tenant died on or after the 1st of January, 1870 (*b*).

Thus the heir or devisee became bound to see that provision was made for all the debts of the deceased, before he could claim the land free from the debts. The position was very inconvenient, for the proper person to pay the debts was the personal representative; but he had no power to sell the lands, unless such power was expressly given him by will.

(vii.) *By the Land Transfer Act*, 1897 (*c*), the personal representative has power to sell the fee simple lands for the purpose of paying any of the debts of the deceased tenant. This Act applies where the tenant dies after the 1st of January, 1898.

(*z*) If the devisee has *bonâ fide* alienated the land, the creditors cannot claim against it. *Re Atkinson*, [1908] 2 Ch. 307.

(*a*) *Note on second reading.*—Even the supposed distinction with reference to the executor's right of retainer seems to be shaken by the decision in *Re Samson*, [1906] 2 Ch. 584.

(*b*) 32 & 33 Vict. c. 46.

(*c*) 60 & 61 Vict. c. 65.

## CHAPTER XV.

### DISABILITIES.

THE tenant in fee simple has so far been considered as being a man, over 21 and in possession of his senses. But the rights and powers of a tenant in fee simple may be restricted or modified by reason of some peculiarity in his status, as follows :—

I. *Artificial persons*, or corporations, *can* usually *convey* lands which they hold, but *lands cannot be conveyed to them*, with certain exceptions, as we have seen (p. 22).

II. *Charities*, whether they are corporations, or merely a collection of individuals, can *convey* lands, but *lands cannot be conveyed to them* except subject to the restrictions imposed by the Mortmain and Charitable Uses Acts (see p. 24).

III. *Lunatics.*—Contracts and conveyances by a lunatic are not *void* (*i.e.* bad from the beginning) but are *voidable*, *i.e.* the lunatic (or his committee) can set aside the contract or conveyance, provided the other party to the contract or conveyance knew of the mental condition of the lunatic.

A lunatic may be certified or "found" to be a lunatic by the Court "by inquisition." If so, a person is appointed to be "committee" of the lunatic.

The committee of a lunatic can convey the lands of the lunatic with the approval of the Lord Chancellor or a judge in lunacy. If a lunatic is not "so found

by inquisition," his lands cannot be conveyed except during a lucid interval.

IV. *Drunken persons.*—Contracts and conveyances by a drunken person are also voidable, if he can prove that the other party knew that he was so affected by drink as not to know what he was doing.

V. *Convicts.*—Their estates vest in an administrator, who can deal with the land, but cannot bar an entail (*a*).

VI. *Infants.*—Land can be conveyed to infants, but *infants cannot convey lands.*

Exceptions: (*a*) *Gavelkind lands* may be conveyed by an infant tenant provided he is *over* 15, and conveys them by *feoffment.*

(*b*) *Marriage settlements.*

By the Infants' Settlement Act, 1855 (*b*), an infant *male if over* 20, and an infant *female if over* 17, *may make a binding marriage settlement by leave of the Court.*

*Note* that the consent of the Court is necessary, so that this does not make valid *every* settlement made by infants over 20 or 17 respectively.

The guardian of an infant cannot convey his lands for him.

Except in the case of a compulsory purchase of the land by a railway or other public company under the Lands Clauses Acts.

The lands of an infant may be conveyed by trustees under the Settled Land Acts.

When land is held by an infant, it is deemed to be "settled land," and the trustees of the settlement may exercise, on behalf of the infant, all the powers of selling, leasing, etc., which are given to a tenant

(*a*) *Re Gaskell and Walters Contract,* [1906] 1 Ch. 440; [1906] 2 Ch. 1.
(*b*) 18 & 19 Vict. c. 43.

for life by the Acts (*c*) (see pp. 41, 42). If there are no trustees, the Court may appoint them.

VII. *Married Women.*—At common law a married woman could not deal with her lands except with the concurrence of her husband. This disability is closely connected with the right of a husband over the property of his wife, and *vice versâ*, and is dealt with in the next chapter.

(*c*) Settled Land Act, 1882, 45 & 46 Vict. c. 38, ss. 59 and 60.

# CHAPTER XVI.

## MARRIED WOMEN.

### SECTION I.

*Rights of the husband over the property of his wife during her life.*

AT the present day these rights depend upon whether the marriage took place before or after the 1st of January, 1883.

(A) *Common Law.—This still applies* in respect of any property acquired before the 1st of January, 1883, by a woman who was married before that date (*a*). The maxim was "*husband and wife are one in law.*" The result was as follows :—

(1) *Real Property.*—The land of the wife was regarded as belonging to one person, consisting of both the husband and the wife (*b*). *Her land could only be conveyed by a fine in which the husband joined : and the wife had to be examined separately* and apart from her husband to ascertain whether she really concurred in the conveyance.

After the Fines and Recoveries Act, 1833, which abolished fines (*c*), a married woman can convey her lands *by deed*, but (in cases where the Married Women's Property Acts do not apply) *her husband*

(*a*) Except so far as the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), applied, see p. 124.

(*b*) The husband, however, had the chief control : Thus, he could grant the land for an estate which would last during his own life, without the wife's concurrence, but he could not deal with the fee simple.

(*c*) See pp. 32 and 33.

*must concur* in the deed, and *she must be separately examined* before a judge or one of the commissioners appointed for the purpose to ascertain whether she really consents to the conveyance (*d*). But a wife could not convey her real property by will even if her husband consented.

(2) *Chattels Real* (*e.g.* Leaseholds).—These *vested in the husband alone*, so that he could dispose of them during his life without the wife's concurrence: but on his death the ownership of the wife revived. The *husband*, therefore, *could not dispose of the wife's leaseholds by his will: in other respects he was practically absolute owner.*

(3) *Chattels Personal* (*e.g. furniture*) *vested in* the husband absolutely, and passed under his will or to his next of kin on his death. But reversionary interests in personal property did not vest in the husband until he "reduced them into possession." The wife, however, could convey these by will if her husband assented.

(B) *Equity.*

These rules of the common law giving the husband rights over the wife's property were naturally not favoured by Courts of Equity, and consequently Equity allowed property to be given to trustees in trust for the wife *separately*.

Land and other property which was conveyed *to trustees "to the separate use" of the wife*, could be dealt with by her in equity as if she were *feme sole* (= unmarried).

Thus, if the wife had an equitable estate in land for her separate use, she could convey it without the concurrence of her husband, and without separate examination. But as she would thereby be subject to the risk of her husband persuading her to sell or

(*d*) A special custom to the contrary would be invalid. *Johnson* v. *Clark*, [1908] 1 Ch. 303.

convey her lands for his benefit, the Court of Chancery invented the "restraint on anticipation."

*Restraint on anticipation.*—When land was granted to a married woman for her separate use, the grantor could declare that she should be restrained from anticipation. If this was done, she had no power to alienate the land or even to anticipate the future rents and profits.

Thus, she could not borrow money on the security of future rents (*e*).

Restraint may be attached to a fee simple, if held for her separate use.

It is a question of construction whether restraint is intended to apply to Capital (*f*).

This restraint is only allowed to take effect *during marriage;* and, therefore, if the husband dies, the widow can deal with the land; if, however, she marries again, the restraint revives (*g*), except so far as she has dealt with the land in the meantime (*h*), *e.g.* by Deed Poll modifying the trusts (*i*).

(C) *By statute.*

Some Married Women's Property Acts were passed before 1882, giving a married woman certain rights over some kinds of personal property, such as savings in a bank: these did not affect her lands, except that by the Act of 1870 land and rents and profits of land which descended to her as heiress was made her separate property.

(*e*) *Baggett* v. *Meux*, 1 Coll. 138; 1 Ph. 627.
(*f*) *Re Currey*, 32 Ch. D. 361; *Re Bown*, 27 Ch. D. 412; *Re Bankes*, [1902] 2 Ch. D. 333.
(*g*) *Tullett* v. *Armstrong* (1838), 1 Beav. 1.
(*h*) But see *Acton* v. *White* (1823), 1 Sim. & St. 429, where she had merely an interest in the income of property which was held by trustees and payable to her for her life.
(*i*) *Re Chrimes*, [1917] 1 Ch. 30.

By the *Married Women's Property Act*, 1882 (*k*), s. 1, where a woman either

(i.) was *married after the 1st of January*, 1883; or

(ii.) was married before that date, but *acquired the property after that date.*

Then she is *capable of acquiring, holding, and disposing of all her real and personal property as if she were a* feme sole *without the intervention of any trustee* (see this section on p. 320).

There are, of course, many women still living who were married before 1883, and who acquired property before that date: to these the old common law applies, and they cannot convey lands unless (i.) they are separately examined and the husband concurs, or (ii.) the land was conveyed to their separate use.

In cases where the Act applies, a married woman can now deal with her lands and personalty either during her life or by will in the same way as a man or an unmarried woman.

By the *Married Women's Property Act*, 1907 (*l*), this power is extended to a married woman who is a trustee. Before the Act, a married woman could not convey freehold lands of which she was a trustee, without the concurrence of her husband, unless she was a *bare* trustee (*i.e.* a trustee with no duties). This curious exception arose through an oversight, the framers of the Act of 1882 apparently thinking that it had been dealt with by the Vendor and Purchaser Act, 1874 (see *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358).

The Act of 1907 has removed this anomaly (*m*).

(*k*) 45 & 46 Vict. c. 75.

(*l*) 7 Edw. VII. c. 18.

(*m*) This Act also remedies a curious defect of the law introduced by the Act of 1882, by which the husband had power to deal with the wife's property without her consent by means of a covenant made by him before the marriage. See Wolstenholme, "Conv and Settled Land Acts," 10th ed., p. 349.

The Act applies to conveyances made after the commencement of the Act of 1882.

These Acts have not destroyed the "restraint on anticipation."

For, by s. 19 of the Act of 1882, the Act is not to interfere with any restriction against anticipation, present or future. But, by the same section, if a woman settles her own property on herself with a restraint on anticipation, such restraint will not protect the property from debts contracted before marriage.

The Act of 1882 has extended the scope of the restraint, for it has made all property of a woman married after the Act her separate property.

The restraint does not prevent her from exercising the powers of a tenant for life under the Settled Land Acts.

## SECTION II.

### *Rights of the Husband after the Death of the Wife.*

A. *Common Law.*—This still applies (1) if the marriage took place before 1883 and the property was acquired before that date; *or*, (2) *if the wife dies intestate.*

(1) *Real Property.*

#### *Estate by the Curtesy.*

The husband took an *estate for life* in the *whole* of his wife's lands after her death, provided

(i.) She was *solely seised of an estate of inheritance.*

"*Solely*," i.e. *not jointly.*

The husband also had a life estate in any land which his wife had held as tenant in common with any other person or persons (*n*).

If land was conveyed to the wife and another as joint tenants, then, on her death, the land went to the other by survivorship.

(*n*) Co. Litt. 183, *a*; Williams, "Real Property," 23rd ed., p. 334.

*" Estate of Inheritance."*

The land must have been held by her in fee simple or in tail, for, if she held for life only, her interest ceased on death.

(ii.) *Issue of the marriage capable of inheriting must be born alive.*

*" Capable of inheriting."*

If land was conveyed to " Alice and the heirs of her body by her husband John," then, if John survived Alice, he would get curtesy if he had had any child by her, for such child could have inherited under the entail. But if John died and Alice married William, William would not have curtesy on her death, for his children could not inherit under the entail.

*" Born alive."*

The child must be born alive ; the test was whether it cried out. If any child was born sufficiently alive to cry out, then the father took curtesy, even though the child died at once.

(iii.) The wife must be *seised in deed.*

That is, she must have actually entered into possession of the land. It was in the husband's power to enter in her name, and therefore it was his fault if he did not enter. However, an entry for her by a trustee is sufficient (*o*).

If entry by the husband was impossible, it was not absolutely necessary. See *Eager* v. *Furnival*, on p. 101, *ante*, note (*k*).

The estate of the husband is called " an Estate by the Curtesy of England," and the husband is called " tenant by the Curtesy."

The derivation is probably from the root " cur " in " curia " and " court," and has no connection with " courtesy."

Curtesy in Gavelkind land is one half, and there is no necessity for birth of issue (see p. 16).

(2) *Personal Property* (including *Chattels Real*).

(*o*) *Parker* v. *Carter*, 4 Hare, 416.

Vested absolutely in the husband "jure mariti" (= "by virtue of his rights as husband").

B. *Equity.*

Equity followed the law in this case and gave the husband curtesy over his wife's equitable estates: but if trustees held the lands for the *separate use* of the wife, *she could dispose of them by will*, and might thus deprive the husband of curtesy.

C. *Statute. Since the Married Women's Property Act*, 1882, a married woman to whom the Act applies (see p. 125) can dispose of her land by will: but *if she dies intestate*, even if married after 1883, the husband still takes an estate by the curtesy.

*Hope* v. *Hope*, [1892] 2 Ch. 336.

Mrs. H. was married before 1882. She acquired certain land under the will of her father, who died in 1891. Therefore the Act of 1882 applied to this land. She died intestate, leaving a son and her husband.

*Held*, the husband was entitled to an estate for life in the land. For the Act only refers to "acquiring, holding, and disposing of" property, and does not refer to devolution on intestacy.

A husband, who is tenant by the curtesy, has the powers of a tenant for life under the Settled Land Act; (s. 58 (1) viii.).

A married woman can also dispose of her personal property (including leaseholds) by will, but if she does not do so, it vests in her husband.

The legal ownership probably does not now vest in him until he is appointed administrator to his wife, but his equitable right to the property vests in him *jure mariti* and is not dependent on his becoming administrator (*p*).

(*p*) *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

## SECTION III.

*Rights of the Wife to the Property of her Husband.*

During the life of her husband the wife has no rights over his property, real or personal.

*On the death of the husband.*—If *the husband makes a will* he may dispose of all his property real and personal and give them to whom he chooses, even though the wife and children get nothing.

*Except* that if he was married before 1834, his widow has a right to "dower."

If *he dies intestate* (*q*), whenever he was married, the widow has a right to dower out of his realty and one half or one third of his personalty and possibly a first charge of £500 as stated on pp. 91 and 92.

*History of the widow's right to dower.*

(*A*) *At Common Law.*—The wife was entitled on the death of the husband to *one third* of her husband's lands *for her life*, provided

(1) He was solely seised of an estate of inheritance (see p. 127).

(2) Issue of the marriage capable of inheriting (*r*) *might have been born.*

Thus, if land was granted to A and the heirs of his body by his wife B; and B died; and A married C, C could not have dower out of that land, as her children could not inherit under the entail. It was not necessary that any child should be actually born.

Seisin in law was sufficient.

The wife had no power to compel the husband to enter on the land, and therefore she took her dower if he had merely the right to enter.

(*q*) If he makes a will but does not dispose of some part of his land, the widow gets dower out of the undisposed of part; but she does not get her £500 in this case. See p. 91.

(*r*) See p. 127.

The right of *Dower* is a right to have a third part of the land marked out "by metes and bounds."

It is not an undivided third, as in the case of joint tenancy or tenancy in common; but a definite part of the land, equal to one third in value, is to be marked out for the *exclusive* use of the widow for her life.

*The right to dower could not be defeated by the husband* if he had once acquired freeholds of inheritance. The right of his wife to dower thereupon became absolute, and he could not sell the land or dispose of it by will except subject to his wife's right to dower.

The wife's right to dower had preference over the claims of his creditors.

(*B*) *In equity.*

*The courts of equity did not give the wife dower out of equitable estates.* Therefore a husband who was intending to acquire land usually took care that the legal estate should be vested in other persons in trust for himself. Thus arose "*uses to bar dower.*"

The most simple form of these was as follows: The husband on purchasing land had it conveyed *to trustees in trust for him* or *to a trustee jointly with himself.* This prevented him from being "solely" seised; but if the trustee died, dower immediately attached to the land.

Another method was by jointure.

If the husband had defeated his wife's right to dower by "uses to bar dower," he usually conveyed sufficient land to himself jointly with his wife to make a provision for her. She would thereby become entitled to the whole of this land by survivorship on the death of her husband (*s*). When the Statute of Uses attempted to destroy equitable estates, the hardship of reviving the wife's right of dower in addition to her jointure was recognized, and it was made possible by the Act for the husband to grant a *legal jointure* to the wife before marriage

(*s*) I. Cruise Digest, 188.

instead of dower (*t*), or to grant a jointure after marriage, in which case she could still claim dower if she gave up the jointure (*u*). These methods were not very satisfactory, and a more complicated form was afterwards invented, by which the husband acquired the absolute right to enjoy and deal with the land by deed or will as if it were a fee simple, but carefully avoided a "sole estate of inheritance." This will be fully explained later (see Chapter XXIV.).

(*C*) *Statute.*

*The Dower Act*, 1833 (*x*).—The object of this statute was to do away with the inconvenient rules by which dower attached indefeasibly to all legal estates, and to give the husband power to remove the wife's right from land which he wished to dispose of, but at the same time to preserve the right of the widow to her third in case the husband did not dispose of the lands and to extend the right to cover equitable estates.

Of the four main provisions of the Act, two deprive the widow of rights, the other two confer benefits upon her.

The Act applies to all women married after the 1st of January, 1834.

There are not many women still living who were married before 1833, and therefore, except in unusual cases, the Dower Act may be assumed to apply.

Provisions of the Act.

(1) *Dower may be barred by a declaration* in a deed or in a will (*y*).

There is no reason now why a husband should bar dower under this provision; for it ceases to attach to any lands which he alienates either during his life or by will under Clause (2) below. At one time conveyancers used to insert such a declaration into every deed; but this is not now done, as it is unnecessary, and may cause hardship by depriving the widow of dower, if the husband dies intestate.

(*t*) 27 Hen. VIII. c. 10.
(*u*) Statute of Uses, s. 9, and see I. Cruise Digest, p. 192.
(*x*) 3 & 4 Will. IV. c. 105. (*y*) Ss. 6 and 8.

(2) *Dower is barred by any absolute disposition of the land*, whether by deed or will (*z*).

Thus the husband can freely dispose of the land, and *the widow gets dower only if he dies intestate* as to the particular lands.

(3) Dower shall attach to equitable estates and any estate which practically amounts to a fee simple (*a*), and

(4) The husband need not have possession of the land (*b*).

Thus if any of the old methods of barring dower are now used, they will have no effect, for the wife will get dower out of the equitable estates created by them should her husband die intestate.

At the present day therefore the husband can freely dispose of all his land by will: but if he dies intestate the widow gets Dower of one third of his lands for her life, provided her right to dower has not been barred by a declaration under the Dower Act.

Since the Act the wife's claim to dower is subject to the claims of the husband's creditors (*c*).

A widow entitled to dower cannot exercise the powers of a tenant for life under the Settled Land Acts.

The Intestates' Estates Act, 1890, as already mentioned (p. 91), gives the widow a first charge of £500 out of the realty, and personalty if the husband dies after 1890 *and without issue*: but this is not "dower."

## SECTION IV.

### *Present effects of the rule that "Husband and Wife are one in law."*

In the cases where the Act of 1882 applies the rule has lost much of its meaning.

(*z*) S. 4. (*a*) S. 2. (*b*) S. 3.
(*c*) But see Williams, "Real Property," 23rd ed., p. 354

In criminal law it still exists; thus a husband and wife cannot alone be guilty of conspiracy. And it survives in one case in the law of real property.

A gift of land to a husband and his wife and another as joint tenants or tenants in common gives one half only of the land to the husband and wife between them, and the other half to the third party.

*Re Jupp* (1888), 39 Ch. D. 148.

J, who died in 1887, gave by will a share in certain property "between my sister Mary Buckwell, Daniel Buckwell her husband, and Harriet Buckwell her stepdaughter in equal shares. *Held*, Mary and Daniel take a half between them and Harriet takes the other half.

But any expression of a contrary intention will give them separate shares,

*Formerly a conveyance of land to a husband and wife as joint tenants, made them "tenants by entireties."*

The effect was that the husband could deal with the rents and profits of the land, and with his life interest absolutely without the consent of the wife: but he *could not deal with the inheritance, i.e.* he could not sell the fee simple without her concurrence. On the death of either, the whole went to the survivor absolutely.

Where the *Married Women's Property Act* applies, a gift of land to a husband and wife jointly now *makes them joint tenants.*

## INCORPOREAL HEREDITAMENTS.

### Arrangement of Chapters XVII–XXIII.

*Future Estates.*—The estates dealt with in the earlier part of this book have been *estates in possession.* The rights of a tenant in fee simple or in tail or a tenant for life have been considered on the footing that he is in actual possession of the land. It is possible, however, to grant similar estates in such a way as to postpone their commencement until some future date or the happening of some future event.

The law has always regarded future estates with some dislike, as they tend to prevent free alienation of the land, and consequently future estates can only be created within well-defined limits.

These limits are dealt with under the following heads :—

(1) The *Rule against Perpetuities.* Chapter XVII.
(2) The *Rule as to Accumulations.* Chapter XVIII.
(3) Classification of Future Estates. Chapter XIX.
(4) Reversions. Chapter XX.
(5) Vested Remainders. Chapter XXI.
(6) Contingent Remainders. Chapter XXII.
(7) Executory Interests. Chapter XXIII.

# CHAPTER XVII.

## THE RULE AGAINST PERPETUITIES.

THE rule very roughly stated is this, that you cannot at this moment tie up property for longer than the lives of persons now living and 21 years after their deaths.

The history of the rule shows that it is founded on the practice of a modern settlement of land (see p. 34), by which land is settled on a man for life, and then on his first son in tail; the property is thus tied up until the son is born and reaches 21. Thus, it was held by four successive decisions of the Courts that property could be tied up—

(i.) During the life of any existing person and the minority of any person living at his death.

(ii.) During the lives of any number of existing persons and during the minority of any person living at the death of the survivor of them.

(iii.) During the life of any existing persons and for 21 years after the death of the survivor, irrespective of the minority of any particular person.

*Cadell* v. *Palmer* (1833), 7 Bli. N. S. 202.

Land was devised to trustees on trust for a term of 120 years, if 28 named persons or any of them should so long live, and after the end of that term to trustees for a term of 20 years, and after the end of both terms on trust for persons to be then ascertained.

*Held*, the gift at the end of 28 lives in being and 20 years (or even 21 years) after such lives, without reference to the minority of any person, was good.

(iv.) If the person who became entitled on the death of the existing person should happen to be a posthumous child, who was *en ventre sa mere* at the time of the death, not being born

until afterwards, the 21 years can be extended by the addition of the time which elapsed between the death of the person in question and the birth of the child.

*The rule against perpetuities* is as follows :—

"Every attempted disposition of land or goods is void, unless, *at the time when the instrument creating it takes effect*, one can say, that it *must* take effect (if it take effect at all) within a life or lives *then* in being and 21 years after the termination of such life or lives, with the possible addition of the period of gestation."

It is impossible to say of any human disposition that it *must* take effect, and therefore the words in brackets must be added.

*Points to note.*

(1) The date from which the period commences is the date *when the gift takes effect.*

Thus, if a gift is contained in a will, the period commences from the death of the testator : if it is in a deed, then from the date of the deed.

(2) You do not wait to see what happens in fact, but you imagine yourself to be living at the time of the death of the testator (or the date of the deed) and the gift will only be good if you can then be absolutely certain that within the period described above the gift *must* either (i.) take effect or (ii.) fail altogether.

If there is any possibility that the gift might be contingent or doubtful at the end of the period allowed, or might take effect after the period allowed, the gift is *void from the beginning.*

Thus, A made a will in 1900, and died in 1908. By the will A gave land upon trusts for his *son S for his life, and after his death for the first child of S who should reach* 21. This gift to

the child of S *is good*, because S is a "life in being" at the date of A's death. And, whatever happens, no child of S can reach the age of 21 years more than 21 years after the death of S, unless it is a posthumous child, in which case the extra time is allowed by the rule.

But if it had been given to the first child of S who should reach 25, the gift to the child would have been bad, because S might have died when his eldest child was under 4.

Again, suppose the same testator, A, gave other land upon trusts for his daughter D for her life, and after her death to the first of her *issue* (children, grandchildren, and so on) who should reach 21.

The gift to the issue will be *bad*, because, although at first sight one would think that some of her issue must either reach 21 within 21 years of D's death, or else die out altogether, yet the following *might* happen:

D might die in 1912, leaving one child, aged 1 year old. That child might marry in 1929, at the age of 18, and die in 1931, under 21, leaving one child, aged 1 year old, who would not reach 21 until 1951, or 39 years after the death of D.

And, because this *might* happen, the gift to the issue of D is void altogether.

*Exceptions to the Rule against perpetuities.*

(1) Estates taking effect upon failure of an estate tail.

If land is granted "to A and the heirs of his body," with remainder to B in fee simple, B's estate *may* not take effect in possession until many generations of A's issue have lived and died. But the gift to B is not void, because A could at any time bar the entail and sell the fee simple, and therefore the land is not *tied up* at all.

(2) Gifts of land for charitable purposes are not void merely because they may go on for ever. But if a future gift of land is made to a charity, it will be void unless it *must commence within the period allowed.*

*Re Lord Stratheden and Campbell*, [1894] 3 Ch. 265.

A testator gave an annuity to a volunteer corps, to commence on the appointment of the next lieutenant-colonel.

*Held*, though this is a gift to a charity it is void, for the next lieutenant-colonel need not necessarily be appointed for many years after the death or retirement of the present officer.

(3) Provisions for payment of the debts of the grantor.

*Bateman* v. *Hotchkin* (1847), 10 Beav. 426.

H. by will devised land to trustees for 1000 years upon trust to raise £500 each year and accumulate it until all his debts (which amounted to £72,000) should be paid.

*Held*, this trust was good, though it might take 53 years or more to pay off the debts.

(4) *The Cy Près doctrine.*—If a testator devises land to a living person for life, and after his death to that person's child (not yet born) for his life, and after the child's death to the son of that child in tail, the gift to the child's son would be void under the rule against perpetuities; but the gift will be construed as nearly as possible (*cy près*) to the intentions of the testator, and he will be deemed to have intended to give an estate tail to the child.

*Humberston* v. *Humberston* (1716), 1 P. W. 332.

A testator devised land to Matthew H. for life, and upon the death of Matthew to his first son for life, and so to the first son of that first son for life, etc. The gift to the son of Matthew's son is *primâ facie* void, for he *might* not be born within 21 years after Matthew's death.

*Held*, "Where the limitation is to the first son unborn, there the limitation to such unborn son shall be in tail male."

This doctrine does not however extend to any other form of gift; and the general rule is that the meaning of the will or deed must be ascertained without reference to the rule against perpetuities,

and then the gift will be void if it infringes that rule.

Thus the doctrine of *cy près* will not be applied if the effect of giving an estate tail to the son would be to alter the order in which the persons selected by the testator will take the land.

*Re Mortimer; Gray* v. *Gray* [1905] 2 Ch. 502.

Land was devised to F. Gray for life;
remainder to the sons of F. Gray successively for life;
remainder (after each life estate) to the sons of each son of F. Gray successively in tail male;
remainder to the daughters of each son of F. Gray in tail;
remainder to the daughters of F. Gray in tail.

*Held*, the *Cy près* doctrine cannot be applied in this case, for, if the gift were construed as an estate tail to each son of F. Gray the estate would descend first to the eldest son of F. Gray, then to the eldest son's sons, *then to the eldest son's daughters.*

Whereas the testator intended it to go first to the eldest son of F. Gray, then to the eldest son's sons, *then to the second son of F. Gray and his sons.*

Therefore the gift to the sons of the sons of F. Gray was void.

# CHAPTER XVIII.

## THE RULE AS TO ACCUMULATIONS.

THE rule against perpetuities as applied to land determines how long the *land* itself can be tied up in such a way as to prevent the *fee simple* from being freely alienable.

The rule as to accumulations determines how long the *income* can be directed to accumulate at compound interest, in such a way as to prevent its being received and enjoyed by anyone.

Originally there was no separate rule as to accumulations, but a direction to accumulate was valid provided it did not infringe the rule against perpetuities. The rule was created in 1800 in consequence of the will of Peter Thellusson.

*Thellusson* v. *Woodford* (1798), 4 Ves. 227.

T gave by will all his property to trustees upon trust to accumulate the income during the lives of his sons A, B, and C, and of all their descendants who might be living at his death, and after the death of the last survivor of them the whole to be held on trust in equal thirds for the eldest male descendants of A, B, and C.

*Held*, although the funds might accumulate at the lowest computation to nineteen millions sterling and no person could enjoy it for perhaps 80 years, yet the trusts were valid.

By the *Accumulations Act*, 1800 (*a*) (sometimes called the *Thellusson Act* because it was passed in consequence of this case), *accumulations may not be directed for longer than one of the following periods.*

(i.) during the life of the grantor, or

(*a*) 39 & 40 Geo. III. c. 98.

(ii.) for 21 years after the death of the grantor or testator, or

(iii.) during the minority of any person or persons living at the death of the grantor or testator, or

(iv.) during the minority of any person or persons who would have been entitled to the income if of full age.

This last period may include the minority of some person who is not living at the death of the grantor.

*Re Cattell*, [1907] 1 Ch. 567 ; C. A., [1914] 1 Ch. 177.

A testator gave by will certain property to trustees upon trust for the children of his eldest son, and directed the trustees to accumulate the income of the share of each child of his son until that child should reach 21. The testator died in 1880 ; his eldest son had a daughter Gladys, born in 1885, who attained 21 in 1906. The income of Gladys' share was accumulated from 1885 until 1906, that is during her minority, though she was not born when the testator died.

*Held.*—This accumulation was valid.

By the *Accumulations Act*, 1892 (*b*), when the accumulation is directed for the purpose of the purchase of land only, the fourth period is the only period allowed.

*Exceptions to the rules as to accumulations.*—The limits mentioned above may be exceeded in cases where income is directed to accumulate, to provide a fund for

(i.) The payment of debts of the settlor or any other person.

Note, that this includes the debts of any person, not merely of the settlor, and thus is wider than the exception to the perpetuity rule.

(*b*) 55 & 56 Vict. c. 58.

(ii.) Maintaining the property in good repair. *Vine* v. *Raleigh*, [1891] 2 Ch. 13 (*c*).

(iii.) Payment off of portions for children of the settlor or any person taking an interest under the settlement, which have been charged by some earlier instrument (*d*).

*Barrington* v. *Liddell* (1852), 2 De G. M. & G. 480.

The Bishop of Durham by his will gave £15,000 to trustees to accumulate during the life of Lord B. until portions of £40,000 which were charged on certain settled lands had been paid off. Lord B. was tenant for life of the settled land and the portions were sums payable to his younger children. Lord B. lived for more than 21 years after the death of the Bishop.

*Held*, the accumulation may continue for the rest of the life of Lord B. because (1) it is for portions, and (2) it is for payment of a debt of £40,000 charged on the settled land.

(iv.) Directions touching the produce of timber.

These provisions as to accumulations are set out in full on p. 303.

*If the periods allowed by this Act are exceeded, the direction to accumulate is not wholly void*, but the accumulation may continue for the longest of the periods allowed by the Act.

*Note*, that the effect of infringing this rule is very different from the effect of infringing the rule against perpetuities; for in that case the whole gift is bad.

At the end of the longest period allowed, the accumulations stop and the income goes to the person who would have been entitled to the income if there had been no direction to accumulate (*e*). If the surplus income is directed to be added to capital this is in itself an accumulation, and if 21 years are exceeded such a direction is void (*f*).

(*c*) The exception covers a fund provided to meet dilapidations at the end of a lease. *Re Hurlbatt*, [1910] 2 Ch. 553.

(*d*) *Halford* v. *Stains* (1849), 16 Sim. 488; *Edwards* v. *Tuck* (1853) 3 De G. M. & G. 40; *Re Elliott*, [1918] 2 Ch. 150.

(*e*) *Griffiths* v. *Vere* (1803), 9 Ves. 127.

(*f*) *Re Hawkins*, [1916] 2 Ch. 570; [1916] W. N. 318.

Thus, A by will gave land to trustees upon trust to pay the income to his wife *W during her life*, and after her death to accumulate the rents and profits until his daughter *D should marry*, and *on the marriage* of D the whole *to be held in trust for D*.

A died in 1860, leaving one son, S, and one daughter, D.

W (the wife) died in 1870.

D did not marry until 1890.

*Result.*—From 1860 to 1870 the rents would be paid to W,

from 1870 the rents would accumulate until 21 years after the death of A, viz. 1881;

from 1881 to 1890 the rents would be paid to S as the heir of A, for the land is not given to D *until* she marries; therefore there is an intestacy, and the land goes to S as heir until 1890.

In 1890 the land and the rents which accumulated between 1870 and 1881 go to D.

*Note.*—Suppose the accumulated rents amounted in 1881 to £1000. This sum would bear interest from 1881 to 1890. This interest would not be allowed to accumulate but would also go to S.

# CHAPTER XIX.

## CLASSIFICATION OF FUTURE ESTATES.

I. *A reversion* (*a*) is a future estate in land which "reverts" or returns to the person who originally had the fee simple or to his heirs.

Thus A is tenant in fee simple of land, and grants it to B for life; on the death of B the land will revert to A or his heirs.

II. *A Remainder.*—When the tenant in fee simple creates a particular estate, and then gives the rest of the fee simple to another person, that person has a remainder.

Thus, A is tenant in fee simple of land, and grants it to B for life, and after B's death to C and his heirs. C has a remainder.

Thus a remainder is an estate *given* to a person after some other estate shall have come to an end, and it may be defined as follows:—

*A remainder is a future estate which waits for and depends upon the termination of some particular estate.*

There are two kinds of remainders, viz. *vested remainders* and *contingent remainders*. The distinction is not accurately stated by saying that a "contingent remainder is a remainder which depends on a contingency." The true test is as follows:—

(*a*) *A vested remainder is one which is ready, from its commencement to its end, to take effect so soon as the particular estate shall determine.*

*E.g.* land is granted to A for life, and after his death to B for life.

(*a*) The phrase "reversionary interest" is often used loosely to denote any future or contingent interest in any kind of property.

At first sight B's estate might be thought to be a contingent remainder, for B will get nothing unless he survives A. *B's estate is* however *a vested remainder*, because if A were to die immediately, B, so long as he lives, is ready to take the land.

(*b*) *A contingent remainder* is one which is *not* ready from its commencement to its end to take effect so soon as some particular estate shall determine.

*E.g.* land is granted to A (a bachelor) for life, and after his death to his first son who shall reach 21.

The son of A has a contingent remainder; for if A were to die immediately, there is no son of A ready to take the land.

If the son of A reaches 21 in his father's lifetime, the remainder becomes vested, for he is then ready to take it at any moment.

*At common law no other forms of future estate were allowed.*

Thus, it was impossible to give the fee simple to A until some event, and then to B; or to give the fee simple to A after the happening of some event.

But in equity it was allowed, and therefore could be done either by means of a use or trust or by a will.

Thus, land could be given to X in fee simple to the use of A and his heirs until some event, and then to the use of B and his heirs. This was not a "remainder," because B's estate did not wait until the termination of the fee simple given to A, but took effect in spite of it. This form of future estate is called an "executory interest."

*An executory interest is a future estate which does not wait for or depend upon the termination of any particular estate.*

An executory interest can only be created either—

(1) *By means of a use or trust*—

It is then called either (*a*) *a springing use*,

*E.g.* X grant lands to T and his heirs to the use of B and his heirs after the marriage of B. Here the use springs up at a future time.

or (*b*) *a shifting use.*

*E.g.* X grants lands to T and his heirs, to the use of A and his heirs until the marriage of B, and then to the use of B and his heirs.

Here on the happening of the future event the use shifts from A to B.

(2) *By will.*

It is then called an "executory devise." Before the Statute of Uses a future *legal* estate could only be created as a remainder: but since the Act the use carries the legal estate, and future *legal* estates can now be created by means of springing and shifting uses.

*E.g.* In the last example, the legal estate now passes to B on his marriage.

All future estates, whether reversions, remainders, or executory interests, may now be transferred by deed (*b*).

(*b*) Real Property Amendment Act, 1845.

## CHAPTER XX.

### REVERSIONS.

When a tenant in fee simple grants a particular estate to another, and retains the rest of the fee simple himself, the person who holds the particular estate holds it as tenant of the grantor. Hence it is said that "There is tenure between a tenant of a particular estate and the reversioner."

But there is no tenure between the tenant of a particular estate and a remainderman.

Thus A, a tenant in fee simple, grants land to B for life, remainder to C for life. B holds the land from A and not from C.

A *reversion is always vested* and cannot be contingent.

For if a tenant in fee simple grants any number of particular estates, he or his heirs are always ready to receive the fee simple again if all the particular estates fail.

Therefore the rules governing a reversion are the same as those governing a vested remainder, except that there are certain rights connected with tenure which belong to a reversioner but not to a remainderman. They are as follows :—

1. *Rent Service.*

In early days a lord who granted a particular estate to another usually stipulated for certain services to be rendered to him.

At the present day a rent is usually reserved instead of services. This is in theory "rent in lieu of service," and is called a "rent service" whenever

the rent is payable by the tenant of a particular estate to the owner of the reversion.

The most common form of rent service at the present day is the rent which is paid by a tenant of a leasehold to his landlord.

Thus if A, tenant in fee simple, grants a lease of his land to B for 21 years, A retains the reversion, and the rent paid by B to A is "rent service."

2. *Distress.*—A right to seize furniture and other chattels from off the land, if the rent is not paid.

This right belongs only to the person who has the reversion, except in so far as it is expressly given to other persons by agreement or by statute.

3. *Attornment.*—If the person entitled to a reversion wished to transfer it to another person, he had to get the consent of the tenant of the particular estate. The tenant was said to attorn tenant to the new reversioner.

The necessity for attornment was abolished by an Act of Anne (*a*), but persons still sometimes attorn tenant to the owner of the fee, especially in mortgages (*b*).

(*a*) 4 & 5 Anne, c. 16.

(*b*) *Note on second reading.*—At one time this was thought to give the mortgagee a power to distrain for the interest, but it is now settled that such a power is void unless registered as a bill of sale, consequently the attornment is now of little use, except as facilitating the entry of the mortgagee. See Key and Elphinstone, Vol. II., pp. 79–80, 10th ed.

## CHAPTER XXI.

### A VESTED REMAINDER.

A VESTED remainder is, as we have seen, similar to a reversion, except that it does not go back to the grantor and there is no tenure.

The following rules are the same in both cases.

1. *The rule as to Merger.*—When the particular estate is conveyed to the person who holds the remainder or reversion—or when the remainderman or reversioner conveys his estate to the tenant of the particular estate, the particular estate is swallowed up or "merged" in the remainder or reversion, provided there is no other particular estate between the two estates.

Thus, land is granted to A for life, remainder to B in fee simple.

If A surrenders or conveys his estate to B, the fee simple swallows up the life estate, and B merely has a fee simple in possession.

If, however, it were granted to A for life, remainder to C for life, remainder to B in fee simple, and A conveyed his estate to B, there would be no merger, for C's estate comes between.

The smaller estate is always destroyed by the larger. A leasehold interest is a less estate in law than a life interest which is freehold.

This leads to a curious result. Thus—

Land is granted to A for 1000 years. Later, the same land is granted to A for life.

The term of years is merged in the life estate, and immediately ceases.

Merger can only take place when—

(1) Two estates in the same land vest in the same person,

and (2) both estates are legal, or both are equitable,

and (3) both are held in the same right.

*I.e.* a life estate held by A as trustee for B will not merge in a fee simple which A holds as his own.

and (4) there is no vested remainder between the two estates.

By the Judicature Act, 1873, s. 25 (4): "There shall not . . . be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity." And there is no merger in equity if the intention is to keep both estates alive (*a*). But the intention not to merge is not presumed without sufficient circumstances (*b*).

2. *The Rule in Shelley's Case* (*c*).

The rule, roughly speaking, is this, *a gift of land "to A for life with remainder to his heirs," gives A a fee simple.*

*Possible origin of the rule.*

At the time of William I., if land was granted to A and his heirs, A (as we have seen) could not sell the fee simple, but could only enjoy the land for his life, and after his death it would go to his heirs. Thus, a gift to "A and his heirs" was the same in effect as a gift "to A for life, remainder to his heirs." The rule seems, therefore, to have grown up that either of these forms of gift gave A a fee simple. Later, a tenant in fee simple acquired the right to deal with the whole fee simple, but the rule remains, although the apparent reason for it has gone.

The same rule also applies if some other estate is put between A's life estate and the gift to his heirs.

Thus, land is granted to A for life, remainder to B for life; remainder to the heirs of A. This gives A the estate for his life, then to B for his life; then to A in fee simple.

(*a*) *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631.
(*b*) *Re Atkins*, [1913] 2 Ch. 619; *Re Fletcher*, [1917] 1 Ch. 339.
(*c*) *Re Hobbs*, [1917] 1 Ch. 569

Thus the words "to the heirs of A" do not give any estate directly to the person who is A's heir; but define or "limit" the estate which is given to A.

*The Rule in Shelley's Case* fully stated is as follows:—

*Where by any gift or conveyance the ancestor takes an estate of freehold and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs or the heirs of his body, the words "his heirs" are words of limitation of the estate of the ancestor and not words of gift to the heirs.*

This rule may be paraphrased as follows:—

When A takes an estate of freehold, and in the same conveyance an estate is given (either with some other estate in between, or without) to the heirs of A, or the heirs of the body of A, the words "his heirs" or "the heirs of his body" describe the estate which A takes, and do not give anything to the heirs.

*Example.*

Land was granted to A for life, remainder to B for life, remainder to the "heirs" of A.

A by a will devised all his land to his *second* son.

*Result:* on the death of A the land goes to B for life: and on the death of B it goes to the second son of A: because the word "heirs" gave A a fee simple which he devised to the second son by will.

The eldest son was of course A's heir, and would have taken the land if the words "to the heirs of A" had been construed to mean "to the person who shall be the heir of A."

*Van Grutten* v. *Foxwell*, [1897] A. C. 658.

William Harris devised land among his children in equal shares for their lives, and after their deaths to the heirs of their bodies in equal shares.

He had one daughter, Mary. Mary claimed that she took an estate tail under the will and barred the entail.

After her death and the failure of her issue, her heir claimed that she had a fee simple when she died.

The heir of William Harris (*d*) claimed that Mary never had more than a life estate.

*Held*, the rule in Shelley's case applied and Mary took an estate tail which she turned into a fee simple and therefore the land went to her heir (*e*).

In a will "issue" *primâ facie* means heirs of body, and where an estate was devised "to A for life and his issue male in succession" it was held that these words gave an estate in tail male to A (*f*).

The rule in Shelley's case only applies when an estate of *freehold* is first given to the person whose heirs are afterwards mentioned.

Thus the rule does not apply to—

(1) A gift in trust for A for 50 years, if he shall so long live, with remainder to the heirs of A,

or (2) a gift to B for life with remainder to the heirs of A. For here there is no gift to A at all.

In both these cases, on the termination of the first estate, the land will go to the person who has proved to be the heir of A after his death.

The rule is a *rule of law* and not a rule for ascertaining the *intention* of the grantor, and therefore it does not apply to documents in the construction of which the intention of the grantor is more especially considered.

Thus, if A grants land "unto and to the use of B upon trust to settle it upon C for his life, and after C's death on the heirs of C's body in the usual way," A obviously intends that B shall use the proper legal language for the purpose of carrying out his intention, and B must therefore settle the land on C for life, with remainder to the *sons* of C in tail, etc.

This form of trust where the settlor has merely given his trustee instructions to prepare a settlement

(*d*) William Harris died before 1833, so that his heir would be traced according to the old law.

(*e*) This case is famous for the judgment of Lord Macnaghten (on p. 667), which should be read by all students interested in the history of the law of real property.

(*f*) *Re Simcoe*, [1913] 1 Ch. 552.

is called an "*executory trust*," or trust *to be executed in the future* by a proper conveyance, as distinct from an "executed trust," where the grantor has himself executed the conveyance in its final form. Hence we get the rule that—

The rule in Shelley's case does not apply to an executory trust.

*Note.*—An executory trust has nothing to do with the expression "an executory interest," and this rule *does* apply to an executory interest.

## CHAPTER XXII.

### CONTINGENT REMAINDERS.

THE rules governing the creation of contingent remainders were of gradual growth, and up to the year 1845 were entirely common law rules.

*These common law rules still govern contingent remainders*, and the later statutory rules are only applied to such remainders if they have failed to take effect by reason of the strictness of the common law rules.

*Common Law Rules.*

*Rule* I.—*The seisin must never be without an owner.* If a person was seised of land in fee simple he could convey the fee simple direct to another person, but if he attempted to give it to another from a future date, the gift was void.

Thus, A could not grant land "to B and his heirs after two years," because it was thought that A by granting the fee simple away had lost the whole of his estate, and as B was not to get it for two years, there would have been a gap of two years during which no one was *seised* of the land.

So also a gift to B for 50 years and then to C in fee simple was void; for during the 50 years B had merely a *term* or personal estate in the land, and no one was seised.

Hence the following rule was laid down, which is really only an explanation of Rule I.

I. (*a*) *Every contingent remainder of freehold must have a particular estate of freehold to support it.*

Thus a gift "to A for life, remainder to the first of his sons who should reach 21," was a good gift, for the seisin is given to

A (a life estate being a *freehold* estate). But if A died before his son reached 21, then again there would be no particular estate of freehold to support the contingent remainder. Hence the following further rule :—

I. (*b*) *Every contingent remainder must vest during the continuance of the particular estate, or at the very moment that it determines.*

Thus it frequently happened that a contingent remainder in favour of a son would fail to take effect, because the father did not live long enough. *But this very liability to failure often saves contingent remainders from being destroyed by the rule against perpetuities.*

*E.g.* A gift to A for life with remainder to the first son of A who shall reach 25. At first sight one would think that this gift to the son *might take effect* more than 21 years after A's death (*i.e.* more than 21 years after a "life in being") (see the rule on p. 138); but this is not so really; for if A died before the son reached 35, there would be a gap in the seisin, and the gift to the son would fail: therefore the gift to the son *must* take effect, if it take effect at all, at the end of A's life.

By reason of this and the following rule, the rule against perpetuities *seldom* applies to a contingent remainder.

*Rule* II.—If an estate is granted to an unborn person, a contingent remainder cannot be granted to the child of that unborn person (*a*).

Thus land could not be given to A for life, remainder to his eldest son for life, with remainder to the eldest son of A's eldest son. The last gift would be void (*b*).

An estate can, however, be granted to an unborn person for life, and an estate can then be granted to some other person who is *not* a child of the tenant for

(*a*) *Duke of Marlborough* v. *Godolphin* (1759), 1 Eden. at p. 415; *Monypenny* v. *Dering*, 2 D. M. & G. at p. 170.

(*b*) The rule also applies to equitable interests, *Re Nash*, [1910] 1 Ch. 1; and see *Re Park's Settlement*, [1914] W. N. 103; and *Re Clarke's Settlement*, [1916] 1 Ch. 467.

life (*c*), provided the rule against perpetuities is not infringed.

*Rule* III.—*A contingent remainder which* (while complying with the common law rules) *might possibly infringe the rule against perpetuities, is void.*

It is not very easy to frame a contingent remainder which shall offend against the rule against perpetuities; for by common law the remainder can only take effect at the end of some particular estate, and therefore *it cannot infringe the rule if the particular estates are all granted to lives in being;* and again, if you give particular estates to unborn persons, and then give remainders over, you will probably find that you have given a remainder to the child of that unborn person, and the remainder will be void at common law.

Recently, however, a case occurred where particular estates were given to unborn persons in such a way that the particular estates need not necessarily come to an end within the period allowed, and a contingent remainder was given at the end of the particular estates, which was not a gift to the child of an unborn person.

*Re Ashforth, Sibley* v. *Ashforth*, [1905] 1 Ch. 535.

The effect of the will was roughly as follows:—

Land was given to A for life, remainder to all the children of A in equal shares for their lives, with remainder *to the last survivor of A's children in fee simple.*

Here A was the "life in being," and the gift to the last survivor of A's children would not take effect until all the children of A except one were dead. The testatrix died in 1864 and A died in 1870, leaving three daughters, all of whom might have lived to be over 90, and the gift to the survivor might therefore not take effect for many more than 21 years after A's death.

(*c*) The doubt expressed by Lord Davey in *Honywood* v. *Honywood* ([1905] 92 L. T. 814) does not appear to be founded on authority. See *Brudenell* v. *Elwes* (1801), 1 East, 442, where an appointment by a mother, under a special power, to the daughter for life, remainder to the son for life (neither of whom was alive when the power was created), was treated as valid, although it was argued that the life interests were void.

*Held* (therefore) that the gift to the survivor of the children of A was void.

*Rule* IV.—A gift creating a "possibility on a possibility" was void.

It is doubtful whether this rule ever existed independently of Rule II., and it is still more doubtful whether it exists at the present day (*d*). The rule is therefore of little practical importance.

*Statutes affecting Contingent Remainders.*

*Act of* 1845.—A contingent remainder was, as we have seen, always liable to be defeated by the particular estate coming to an end, before the remainderman was ready to take the land. This rule caused great hardship, and was sometimes used for the purpose of fraudulently destroying contingent remainders by destroying the particular estate before the death of the life tenant.

Thus, if land were granted—
to A for life, remainder to his first son who should reach 21, remainder to B in fee simple,

A and B could arrange to destroy A's life estate before the son reached 21. This could be done by A surrendering his life estate to B, or by B conveying the fee simple to A. In either case the life estate would *merge* (see p. 149) in the fee simple, and thereupon come to an end; and if the contingent remainder was not ready to vest, it would thereupon fail.

But now *by the Real Property Amendment Act*, 1845, s. 8 (*e*), a contingent remainder shall not fail by reason merely of the destruction of the particular estate by merger, forfeiture, or surrender, during the lifetime of the tenant for life.

For the exact words of this section see p. 308.

Even after this Act a contingent remainder was always liable to be defeated by the particular estate

(*d*) Williams, "Real Property," 23rd ed., p. 395, citing *Re Frost* (1890), 43 Ch. D. at p. 253, and *Re Ashforth*, [1905] 1 Ch. 535.
(*e*) 8 & 9 Vict. c. 106.

coming to an end by natural means before the remainderman was ready to take.

Thus, if in the last example A died when his son was 20 the gift to the son would fail.

The following case was one of great hardship and led to the alteration of this rule.

*Cunliffe* v. *Branker* (1876), 3 Ch. Div. 393.

Land was given by will to trustees to the use of the husband for life, remainder to the use of such of his children as should be living at the death of both the husband and the wife. The husband died during the life of the wife. Therefore the children who were to take were not ascertainable until a future date, namely the death of the wife, and were therefore not ready to take the land.

*Held*, the gift to the children fails (*f*).

Hence Parliament desired to save such hardships. This could have been done simply by repealing the rule that the seisin must never be without an owner; but the result of that would have been in many cases to bring in the rule against perpetuities and make gifts void which were good before.

Thus we have seen that a gift—

to A for life, remainder to his son at 35 was good, if the son reached 35 before A's death, just because it could not take effect unless he did.

But if the same gift is given in such a way that there shall be no gap in the seisin, it would have been void from the beginning by reason of the rule against perpetuities.

Thus, in case of a gift—

unto and to the use of T on trust for A for life, remainder on trust for the first son of A who shall reach 35. This gift need not necessarily take effect immediately on A's death, for the seisin will be in T, if the son has not reached 35 on A's death.

(*f*) See also *White* v. *Summers*, [1908] 2 Ch. 256.

But the son might be only 5 years old when A dies, consequently this gift *might take effect* more than 21 years after A's death, and is therefore *void from the beginning* by the rule against perpetuities.

Thus the rule against perpetuities would often destroy an *executory* interest, while it spared a contingent remainder. Therefore Parliament left the old common law rules still subsisting, but said that if the contingent remainder should fail, then it might still be good, provided it would not have infringed the rule against perpetuities if it had been given in such a way as to prevent a gap in the seisin.

The enactment was as follows:—

*By the Contingent Remainders Act*, 1877 (*g*), a contingent remainder shall not fail by reason of the termination of the particular estate before the remainder has vested, but shall be capable of taking effect as if it had been originally created as an executory interest.

This Act only applies to remainders created after 1877 (*h*).

For the full text of this section see p. 310.

*Application of the Act.*—A future gift created after 1877 must always be construed, if possible, as a contingent remainder; and if it would have been valid by the common law rules, it is valid now.

But if it fails under the common law rules, then the statute will save it, unless it would have infringed the rule against perpetuities if it had been made by means of a trust.

Thus a gift to the first son who shall reach 35 (as above) cannot be saved by the Act, if the son does not reach 35 in the father's life.

(*g*) 40 & 41 Vict. c. 33.
(*h*) See *White* v. *Summers*, on p. 250, *post*.

But if the gift is to the first son to reach 21 (*i*), and the father dies when the son is under 21, the statute will save it, because a gift—

unto and to the use of T in trust for A for life, remainder in trust for the son of A at 21,

would be good (for it *must* vest within 21 years after A's death).

(*i*) A doubt has been raised whether the statute would apply where a contingent remainder is granted by deed without a use, see p. 310, note (*c*); and also whether it applies to a contingent class when some of the class are ascertained at death. *Re Robson*, [1916] 1 Ch. 116. This case also decides that after Land Transfer Act, 1897, all contingent remainders by will are equitable in their inception.

# CHAPTER XXIII.

## EXECUTORY INTERESTS.

### SECTION I.

### *Forms of Executory Interests.*

AN executory interest is any future estate in land which is not a reversion or a remainder. At common law, therefore, such estates were impossible, for the fee simple could not be granted to a person from a future date, unless that date was the termination of some smaller estate.

If, however, the land came within the jurisdiction of the Court of Chancery, these rules were not applied.

Since the courts of law refused to recognize uses and trusts or wills of land, all matters relating thereto were decided by equitable rules; hence either by means of a will or by means of a use or trust future estates in fee simple could be created to commence at any future time or to terminate upon the happening of any future event, subject only to the rule against perpetuities.

Executory interests are, therefore, of two kinds:—

(1) *Shifting and springing uses.*

A very common example of a shifting use occurs in marriage settlements. The settlement is usually made before the marriage (for otherwise there is no consideration); and provision should therefore be made for the land remaining the property of the settlor, if the marriage does not take place. Thus—

A (the settlor) grants land to T and his heirs to the use of A and his heirs until the marriage of B and C, and, after the solemnization thereof, to the use of B for life, with remainder to the use of the sons of the marriage in tail, etc. (*a*).

The result of this was, in early times, that the fee simple passed to T, and the common law courts would not recognize any of the other provisions of the settlement: but the Court of Chancery compelled T to hold his legal estate to the use of A until the marriage, and then to the use of B and his children, etc.

Legal estates can now be given by means of a shifting use. For since the Statute of Uses the person who has the use has the legal estate.

Thus, in the last example, A gets the legal estate in fee simple; but, on the happening of the marriage, the fee simple passes away from A, and vests in B for life, etc.

T has no estate at all (*b*).

(2) *Executory devise.*

*Example—*

A testator devises land to his daughter if she shall attain 21 or marry. The testator dies when daughter is aged 10. This is an executory devise to the daughter. Until the daughter reaches 21 or marries, the land is undisposed of, and vests in the testator's eldest son in fee simple, but, on the happening of either of those events, the fee simple vests in the daughter.

Executory interests, being free from the common law rules which restricted the creation of contingent remainders, have always been especially liable to be destroyed by the rule against perpetuities. The very greatest care should therefore be taken, when creating executory interests, to ensure that the future estate must in every possible event vest within a life in being and 21 years thereafter.

(*a*) See the form of a settlement on p. 331.

(*b*) Before 1860 T was said to have a *scintilla juris*, or mere spark of seisin, left in him, in order that he might be "seised to the use" of B when the marriage took place, and thus enable the Statute of Uses to apply.

## SECTION II.

### *Powers of Appointment.*

Executory interests are frequently created by means of powers of appointment: that is, by giving to some person the right to take the land away from one set of persons and give it to others.

*A power is a capacity given to a person to dispose of a greater estate in the land than he himself possesses.*

Or, more roughly, "a power to give away what you have not got."

Originally, even a tenant in fee simple had no power to dispose of the land for more than his own life: but by common law and the statute *Quia Emptores*, he soon acquired a *power* to sell or convey the whole fee simple; and by the Statute of Wills he acquired a power to dispose of the land by will. These powers are now considered as belonging naturally to a tenant in fee simple, and the word "power" is used to denote the same sort of powers when possessed by some person who has not the fee simple.

*Powers are either—*

(1) *General Powers*,—where the donee of the power can "*appoint*" the land to any one without restriction.

*E.g.* A grants land to such persons as B shall appoint by deed or by his will.

B is called the "appointor," or "donee of the power," and he can "appoint" or give the land to any one he likes, including himself.

Until B makes the appointment he has no estate or interest in the land; but he can, at any moment, by executing a deed, vest the fee simple in himself.

(2) *Special Powers*,—where the donee of the power can only appoint the land to one or more of the members of a certain class of persons.

Thus, land may be given by a marriage settlement to the husband for life, with remainder to such of the children of the marriage as the husband shall by will appoint.

The husband can then give the land by his will to any of his children; but he cannot give it to any person who is not his child. The children are said to be the "objects of the power."

If the donee of the power attempts to appoint the land in favour of any person who is not an object of the power, the appointment is bad. This is called an "*excessive execution*" of the power.

Thus, if the husband appointed part of the property to a *grandchild*, the appointment of that part would be bad.

Special powers are either—

(*a*) *Non-exclusive:* where the appointor must not exclude any member of the class; or

(*b*) *Exclusive:* where the appointor can appoint the whole property to one or more of the class and exclude the others.

At common law a special power was deemed to be non-exclusive unless the appointor was expressly authorised to exclude some of the class; and he was obliged to give some substantial share to each one, otherwise the appointment was "illusory" and void.

Now, by the *Illusory Appointments Act*, 1830 (*c*), in case of a non-exclusive power an appointment of the smallest amount is sufficient;

And by the *Powers of Appointment Act*, 1874 (*d*), a special power is *deemed to be exclusive*, unless the appointor is expressly directed to give any particular portion to any member of the class (*e*).

Thus, if at the present day land is given "to such of the children of B as B shall by will appoint," B can give the whole of

(*c*) 11 Geo. IV. & 1 Will. IV. c. 46, s. 1.
(*d*) 37 & 38 Vict. c. 37.
(*e*) Goodeve's "Real Property," 5th ed., p. 288.

the land to any one of his children. Again, if the settlement expressly directs that he must give some part to each child, then he can give the smallest fraction to all his children except one, and give the whole of the land except that fraction to one child.

Powers may be created by deed or by will or by statute, and they may affect either the legal or the equitable estate.

Hence powers may be classified as follows :—

1. *Common Law Powers*, which take effect under common law rules, and do not depend on equity or the Statute of Uses.

In early times, before a tenant in fee simple could alienate the fee, a grant to him, " his heirs and *assigns* " would give him power to alienate the fee. This was a Common Law power.

2. *Powers under the Statute of Uses*, where the exercise of the power transfers the *legal estate* by reason of the Statute of Uses, which vests the legal estate in the person who has the use.

*E.g.* " to T to the use of such persons as A shall appoint." A appoints to the use of X. X gets the legal estate.

3. *Equitable Powers*, where the appointor cannot deal with the legal estate, but can only appoint the equitable estate.

*E.g.* " unto and to the use of T in trust for such persons as A shall appoint." A appoints in favour of X. T then holds the land in trust for X.

4. *Statutory Powers*, or powers created by statute.

*E.g.* the powers given to a tenant for life under the Settled Land Acts, whereby a person who has only a life estate can sell the whole fee simple.

The appointor need not have any estate or interest in the land over which he has a power of appointment.

In this case the power is said to be *collateral*, and is—

Either (*a*) *simply collateral:* when he cannot appoint to himself.

Or (*b*) *collateral and in gross:* when he can (*f*).

If the appointor has some estate in the land, the power is said to be a power *relating to land* and then it is—

Either (*a*) *appendant:* when the appointor can, by the exercise of the power, destroy his own estate.

*E.g.* a tenant for life can sell the whole fee simple under the Settled Land Acts, and thus destroy his own life estate in the land.

Or (*b*) *appendant and in gross:* when the power does not arise until the termination of the estate of the appointor.

*E.g.* land is granted "to A for life, with remainder to such of his children as he shall by deed or will appoint."

Powers may be released by a deed (*g*), except powers "coupled with a duty," *i.e.* powers which are given to one person upon trust to be exercised for the benefit of others (*h*).

## SECTION III.

### *The Rule against Perpetuities as affecting Powers of Appointment.*

1. *General Powers.*—The object of a general power is to *enable* land to be freely sold or otherwise disposed of. Therefore the land is not *tied up* by the creation of a general power.

Hence the period of the rule against perpetuities does not begin to run until the date of the *exercise* of the power.

*Rous* v. *Jackson* (1885), 29 Ch. D. 521.

1800. Creation of power.

In 1800 property was settled on the marriage of J and C on trust for J and C for their lives, and after their deaths, if there should be no children, for such persons as C should appoint by

(*f*) See more fully Goodeve, 5th ed., pp. 276–278.
(*g*) Conveyancing Act, 1881, s. 52.
(*h*) *Re Eyre*, 49 L. T. N. S. 259; [1883] W N. 153.

her will. C died in 1838, having appointed the property to R (*who was born after* 1800) for life with remainder to his son in tail. 1838. Exercise of power.

Thus, if the period ran from 1800, R would not be a "life in being," and the gift to his son would be void.

But *Held*, that the period ran from 1838, when the power was executed, and at that date R was a "life in being," and the gift to his son was therefore valid.

2. *Special Powers.*—The object of a special power is to *restrict* the persons to whom the land may be conveyed. Therefore the land is *tied up* so soon as the power is created.

Hence the *period begins to run from the date of creation of the power.*

Thus, suppose that in 1800 property had been settled on trust for J and C for their lives, and after their deaths for such of the *nephews* or great-nephews of C as she should appoint. And C in 1838 appointed by will to her nephew R (who was a bachelor and was born after 1800) for life, with remainder to his first son who should reach 21. The gift to the son of R would have been *void*—for the period would run from 1800 when R was not a "life in being," and therefore the son of R need not necessarily reach 21 within a life in being and 21 years thereafter.

In applying the rule against perpetuities to special powers of appointment, the *facts* to which the period is to be applied are ascertained *when the power is exercised* (*i*), with the following result:—

(1) If in the events which have then happened the interests appointed *must* vest within the life of a person who was living *when the power was created*, or within 21 years afterwards, the appointment is good.

(*i*) It should be remembered that in other cases the facts to which the period is applied are the facts which *might* happen, regarding them from the date when the instrument which creates the gift takes effect.

(2) Otherwise the appointment, so far as it will not vest within those limits, is bad.

*Re Thompson*, [1906] 2 Ch. 199.

1872. Creation of power. The testator, who died in 1872, gave property to his wife for life, and after her death on trust for C T and his issue in such manner as the wife should by will appoint. The wife died in 1893. Exercise of power. 1893, having by will appointed the property to C T for life, with remainder to such of his children as should attain 25, etc. All the children of C T attained 25 during the life of the wife, *i.e.* before 1893.

*Held*, as the interests of these children had all vested during the life of the wife, who was living in 1872, the appointment to them was good.

If, however, any child of C T had been born after the death of the wife the appointment to such child would have been bad.

## SECTION IV.

### *Fraud on a Power.*

If the appointor appoints the land to some person who is an object of the power, but *for the purpose of benefiting himself* or with some other ulterior purpose not for the benefit of the object of the power, the appointment can be set aside as a fraud on the power.

*Hinchinbrooke* v. *Seymour* (1784), 1 B. C. C. 394.

S had a special power of appointment among his children over a sum of £10,000; he had one son and one daughter, and he appointed the whole fund to his daughter aged 14, who was in consumption. The daughter died the next year so that the father (S) got the whole fund himself as her next-of-kin.

*Held*, the appointment was void (*k*).

(*k*) See the explanation of this case in *Henty* v. *Wrey* (1882), 21 Ch. D. 332, where a father *bonâ fide* appointed a fund to his three daughters aged nine, seven, and one, and two of the daughters happened to die under 21. The appointment was held good.

## SECTION V.

### *Defective Exercise of a Power.*

If the appointor exercises the power in the wrong manner, the appointment is void. But the Court of Chancery will give effect to the appointment if—

(1) The defect is merely formal, *and*

(2) The appointment was exercised in favour of the wife, child, or creditor of the appointor, a charity or a purchaser (*l*).

*Tollet* v. *Tollet* (1728), 2 P. Wms. 489.

T had a power to appoint property *by deed*. He appointed it *by will* in favour of his wife.

*Held*, the appointment can be enforced (*m*).

But a power *to appoint by will* cannot be remedied if it is exercised by *deed*, for the grantor of the power intended it to be exercised by an instrument which should be *revocable* until the death of the appointor, and not by an irrevocable document such as a deed (*n*).

(*l*) Provided, of course, that such persons are proper objects of the power.

(*m*) And see *Re Barnett*, [1908] W. N 28.

(*n*) *Adney* v. *Field* (1767), Amb. 654.

# CHAPTER XXIV.

## USES TO BAR DOWER.

It is no longer necessary to convey lands to a husband in such a way as to defeat his wife's right of dower, except in the very rare case of a man who was married before 1833, and whose wife is still living. But it is necessary to know the object and effect of conveyances framed for this purpose, for such conveyances frequently appear at the present day upon the proof of title on a sale of land.

Dower, as we have seen (p. 129), was the right of a wife after the death of her husband to one third of his lands for her life; and this right attached to any land of which the husband became "*solely seised of an estate of inheritance*" at any time during the marriage. If the husband wished to sell the land, he could only sell it subject to the wife's right of dower.

*Older methods of barring dower* are no longer of very great importance. They included the following:—

(i.) A, the husband, having agreed to buy land, it was conveyed "to B, C, and D to the use of A," or after the Statute of Uses, "unto and to the use of B, C, and D in trust for A." Thus A had no estate at law, and equity did not enforce dower.

The inconvenience of this was that A could not sell the land without the concurrence of B, C, and D, and, if they were fraudulent, they might be able to sell the land to a *bonâ fide* purchaser without the knowledge or consent of A.

(ii.) The land might be conveyed to the husband, A, jointly with B and C; then A was not "*solely* seised," and the dower would not attach.

One disadvantage of this was that, if B and C died, A became solely seised and dower attached to the land.

(iii.) By means of a jointure settled on the wife before marriage (see p. 130).

The object of lawyers was to invent a form of conveyance under which the husband should have full power to dispose of the land by himself during his life, or by his will, and that if he died intestate it should go to his heirs; but that *he should not have "a sole estate of inheritance."*

A method of doing this was invented by Mr. Fearne towards the end of the eighteenth century by making use of a general power of appointment as follows:—

A, the husband, is buying land. The land is conveyed to X to the following uses:—

(1) To the use of such persons as A shall by deed or will appoint.

This gave A full power to dispose of the whole fee simple; under the Statute of Uses, but did not give him any estate in the land.

(2) In default of appointment, to the use of A for life.

This gave A a legal estate of *freehold*, but not "of inheritance."

Pausing here, A has full power to dispose of the land, and has a freehold estate; but if he died without a will, the land would not go to his heirs.

Therefore an estate must be given "after A's death to his heirs."

But the effect of a gift "to A for life and after his death to his heirs" would, by the rule in Shelley's case, give a fee simple in remainder, and his life estate would merge in the fee simple and give A a fee simple in possession, which would be an "estate of inheritance."

To prevent this some *vested remainder* must be inserted between the life estate and the gift to the heirs; and it should, if possible, be a vested remainder not likely to take effect. This was done as follows:—

(3) If A's estate should determine by merger,

forfeiture or surrender during A's life, then to the use of T during the rest of A's life, in trust for A.

This is a vested remainder in T, for *T is ready to take the land* immediately A's life estate shall determine in any way except by his death. But it is not very likely to happen; and if it does, T must hold his estate in trust for A.

(4) Remainder to the use of the heirs of A.

This form was used for some years even after the Dower Act, 1833, if the husband was married before 1833.

If the husband was married after 1833 it was usual (though unnecessary, see p. 131) to put into the deed a declaration against dower.

If it was not known when he was married, both forms were used.

Now it is assumed that the husband was not married before 1833, and neither form is used, the land being conveyed direct to the husband in fee simple; for dower does not now attach to the lands unless the husband dies intestate without having disposed of the land.

# CHAPTER XXV.

## RIGHTS OVER LAND IN THE POSSESSION OF OTHERS.

### Section I.

### *Nature of Incorporeal Hereditaments.*

Future estates in land are incorporeal hereditaments which may at some future date become corporeal hereditaments, that is, estates in possession.

There are other incorporeal hereditaments, which can never become corporeal, but are present rights to use or enjoy in a particular way the land or the income of land which belongs to other persons. The most important examples of these are—

1. *Rights of common*, including

   Common of pasture: the right to feed cattle on the land of another.

   Common of turbary: the right to dig turf.

   Common of piscary: the right to catch fish.

2. *Seignories:* a seignory is the interest of a lord who has a tenant holding of him in fee simple.

In every manor there are usually four kinds of lands—

(i.) The lord's demesne: that is, the mansion house and land in the possession of the lord of the manor himself.

(ii.) Land held by freehold tenants in fee simple: over these the lord of the manor simply has a seignory, and no right of possession.

(iii.) Land held by copyhold tenants: of these the freehold is in the lord of the manor.

(iv.) Waste lands: which are unenclosed, and over which all the tenants of the manor have rights of common and other rights.

3. *Rents* payable by the persons in possession of the land.

4. *Easements*, or rights to use the land for certain purposes.

5. *Profits à prendre*, or rights to take something from the land.

6. *Advowsons:* an advowson is a right to appoint a clergyman to a living in the Church.

7. *Tithes*, a tenth part of the rents and profits of certain lands which are payable to the rector or vicar of the parish.

Most of these rights may be enjoyed by a person because they have been granted to him or his ancestors, or because he holds a particular piece of land to which these rights have become attached (*a*).

(1) *Rights in gross.*—Rights granted to a person and his heirs, and enjoyed by them whether or not they hold any particular piece of land.

Thus, a lord of a manor might grant to his second son and his descendants for ever the right to pasture cattle on the waste lands of the manor.

(2) *Rights appendant.*—Rights the enjoyment of which is attached to a particular piece of land because it is part of the same manor as the land over which the right exists.

Thus, the tenants of a manor have rights of common over the wastes of the same manor.

(*a*) Easements proper must be appurtenant; they cannot be held in gross (see p. 177).

These rights are said to be enjoyed by reason of the origin of their tenure.

On a sale of the land, the right goes with the land to the purchaser.

(3) *Rights appurtenant.*—Rights the enjoyment of which is attached to a particular piece of land by grant or prescription and not because it is part of the same manor.

Thus, the lord of the manor might grant to the owner of a neighbouring piece of land, which was not part of the manor, a right for him and *all persons who should from time to time become entitled to that piece of land*, to pasture cattle on the waste lands of the manor.

## SECTION II.

### *Rents.*

*Rents* are of many kinds.

(1) *Rent service* is the rent paid by a tenant of land to his landlord.

Whenever rent is paid by a tenant for years, or for life, or a larger estate, to the person who has the reversion, it is called "rent service," because it represents the services which the tenant in former times would have performed for his lord. The rent paid by an ordinary tenant of a lease to his landlord is rent service.

Rent service carries with it at common law a right of *distress*, *i.e.* a right to seize or "distrain" the chattels on the land if the rent is not paid. This common law right of distress extends to all chattels on the land whether they belong to the tenant or not.

*Exceptions.*—The tools and implements of trade and bedding and clothes of the tenant to the value of £5

cannot be taken, and relief is given to lodgers whose goods are seized (*b*).

(2) *Quit rent* is the form of rent service which is paid by a tenant in fee simple to the lord who has the seignory.

(3) *Rent charge* is rent which is charged upon land by deed, or Act of Parliament, and payable to some person who is not the landlord, with an express power of distress.

Thus, in settlements of land an annual sum of, say, £500 is charged upon the land, and payable to the wife, if she survives, by way of jointure.

Rent charges are usually given to a person for life, but they may be given to him in fee simple.

An express power of distress only extends to the chattels of the person liable to pay the rent.

(4) *Rent seck.*—Rent charged upon land in the same way as a rent charge, but with no express power of distress.

This was called *sec* (Lat. *siccus* = dry, or barren), because there was no power to enforce the payment by distress, and the rent was therefore often irrecoverable.

This distinction is now practically abolished.

*By the Conveyancing Act*, 1881 (*c*), any person entitled to any rent issuing out of land has an implied power of distress and other powers as follows :—

(1) If the rent is unpaid for 21 days after it falls due, to distrain.

(2) If the rent is unpaid for 40 days,

(*a*) to enter and take possession,

(*b*) to lease the land for the purpose of raising money to pay the rent.

(*b*) 34 & 35 Vict. c. 79. (*c*) S. 44.

## SECTION III.

### *Easements and Profits.*

(*a*) *Easements.*—An easement is the right of an owner of land (*d*) to use the land of another for a certain purpose without the right to take anything from the land, or to prevent the owner of other land from using it in some particular manner.

*Examples.*—Rights of way, rights to carry water across lands by means of pipes or otherwise, rights of drainage, rights to light, etc.

*Acquisition of Easements.*—Easements may be acquired.

(1) *By Express Grant.*—A tenant in fee simple may agree to grant to another a right of way over his land.

This may now be done by means of a use (*e*).

If X grants land to A to the use that B shall have a right of way over the land: B gets a legal right of way.

By the Conveyancing Act, 1881, s. 6, when a person conveys land he is deemed to convey with it all rights of light and other easements appurtenant to the land, or enjoyed with it, as if *they had been expressly mentioned in the conveyance.*

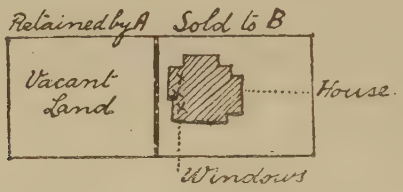
(2) *By Implied Grant.*—When the owner of a large piece of land conveys part of it to another, the part conveyed cannot have any easements over the part retained, for a man cannot have an easement over his own land (see p. 179). But if the land granted has, in fact, enjoyed any such advantages as access of light or use of drains, the grantor cannot afterwards destroy them. The rule is sometimes stated as follows: "*A man cannot derogate from his own grant*" (*f*).

(*d*) This being the definition of easements they cannot be held "in gross." A right in the nature of an easement held by a person and his heirs is called a *quasi* easement.

(*e*) Conveyancing Act, 1881, s. 62.

(*f*) *Cable* v. *Bryant*, [1908] 1 Ch. 259.

Thus A owns land partly covered with buildings: he sells the part containing the building to B.




A cannot build on the vacant land in such a way as to shut out the light from the house sold to B.

*Swansborough* v. *Coventry* (1832), 9 Bing. 305.

The Postmaster-General owned certain land. He sold part of the land, on which was a house, to S. On the same day he sold the rest of the land to C. C's land was practically vacant land, the only building being one storey high, and the house bought by S received its light over the top of the low building on C's land. C commenced to build on his land so as to obstruct the light coming to the house bought by S.

*Held*, the Postmaster-General could not have derogated from his grant by increasing the one-storey building so as to obstruct the lights of S's house, and C was in no better position.

This case also illustrates the further rule that if the original owner of the whole land sells the vacant land over which the light comes, either *at the same time*, or *after* he sells the house which has enjoyed the light, the purchaser of the vacant land cannot obstruct the light of the house.

But if the original owner sells the *vacant* land, and retains the house which has enjoyed the light, the purchaser of the vacant land can obstruct the light coming to the house. There is no implied reservation to the grantor of light (*g*) or any other easement (*h*), and a purchaser from the grantor is in no better position; therefore if the original owner sells the house *after he sells the vacant land*, the purchaser of

(*g*) *Ray* v. *Hazeldine*, [1904] 2 Ch. 17.
(*h*) Except easements of necessity.

the vacant land may obstruct the light of the house (*i*).

(3) *By Prescription:* as to this see p. 252.

*Destruction of Easements.*—An easement may be (1) *released* by deed, or (2) it may be *abandoned*, or (3) *merged*.

*Abandonment.*—There is no fixed time during which mere non-user of an easement will destroy it. But if the easement is not used for a long time, and particularly if the person entitled to the easement does some *act* (*e.g.* blocking up a window which received the light) which shows an intention to abandon the easement, it may be destroyed.

*Merger.*—A person cannot have an easement over his own land: therefore if the land to which the enjoyment of the easement is attached (called the "dominant tenement") passes to the same person as the owner of the land over which the easement is enjoyed (called the "servient tenement") the easement is destroyed (*k*).

(*b*) *Profits à prendre.*—A profit is the right to take something from the land, *e.g.* rights to dig minerals, shoot game, catch fish, etc.

The rules as to acquisition and destruction are similar to those relating to easements, except as to prescription (for which see p. 252).

## Section IV.

### *Advowsons.*

I. *Advowson of a Rectory.*—An advowson of a rectory is the right to appoint a rector of a parish who will receive the tithes and perform the duties of the church. If a lord of a manor built a church,

(*i*) *Wheeldon* v. *Burrows* (1879), 12 Ch. D., p. 31.

(*k*) But not if part of the land is subject to a lease. *Richardson* v. *Graham*, [1908] 1 K. B. 39.

he would usually grant a piece of land to the church. The lord thereupon had the *right to appoint a rector of the church*, and the tithes or tenth part of the produce of all lands in the parish became payable to the rector.

It frequently happened that the lord of the manor on his deathbed was persuaded to make various gifts to the monasteries and other ecclesiastical corporations, and the advowson of the rectory was frequently given to a neighbouring monastery.

The monastery thereupon appointed itself to be rector, so as to receive the tithes and the profits of the glebe land, and appointed some member of the monastery to look after the cure of souls: he was called a *vicarius* (or vicar), because he performed the services in place of the rector.

Henry VIII. abolished the monasteries and granted their lands and rights to lay persons. Thus, at the present day, the rector is often a lay person, who receives the tithes and has the right of appointing a vicar.

II. *An advowson of a vicarage* is therefore the right to appoint a vicarius or vicar when the rectory has become vested in a lay person or any person or corporation who does not perform the duties of the clergyman.

*Sales and Transfers of Advowsons.*—Advowsons can be transferred or sold; but *not if the church is empty*, *i.e.* if there is at the time no incumbent.

The sale of an immediate right to appoint a clergyman to a *vacant* benefice was considered to be a sin, as making money out of a sacred duty. The offence is called "simony."

But a sale of the perpetual right to appoint clergymen from time to time is allowed, provided the clergyman then holding the benefice is still alive.

At one time this rule led to bargaining and selling over the deathbed of the incumbent; for the sale was good so long as he was alive, even if he were *in extremis*. This is now changed.

*By the Benefices Act*, 1898 (*l*), the Bishop may refuse to institute the person appointed if a sale takes place within one year before a vacancy occurs, unless it can be proved that the sale was not made in view of a probable vacancy (*m*), and no transfer can be made within 12 months after an institution of a clergyman, and every transfer must be registered (*n*).

A clergyman cannot buy for himself the next presentation to a living.

This rule used to be evaded as follows: A clergyman would buy for himself a life estate in the advowson, and would appoint himself so soon as the church became empty; he would then hold it until his death. This was prevented by the same Act of 1898, and now—

A person who sells an advowson must sell his whole estate in the advowson (*o*).

The appointment of a clergyman to a living is not complete until he has been instituted by the Bishop.

Before 1898 some advowsons were "donative," in which case the appointment alone was sufficient without any institution; but now all advowsons are "presentative," *i.e.* an institution by the Bishop is necessary (*p*).

The owner of an advowson cannot appoint a clergyman to a living for a certain time or subject to any agreement to retire when called upon to do so except—

(i.) The clergyman may agree to retire in favour of any one named person;

(ii.) or in favour of one of two named persons, both of whom are nearly related by blood or marriage to the appointor (*q*), and no such agreement can now be made *on a transfer of the advowson* (*r*). An advowson cannot be sold by public auction except

(*l*) 61 & 62 Vict. c. 48. (*m*) S. 2 (1) *a*.
(*n*) S. 1 (1) *a*. (*o*) S. 1 (1) *b*. (*p*) S. 12.
(*q*) 9 Geo. IV. c. 94, and see Williams, "Real Property," 23rd ed., p. 481. (*r*) S. 1 (3).

in conjunction with a manor or at least 100 acres of land belonging to the same person (*s*).

*Tithes.*—In early times every landholder was under a voluntary duty to pay one tenth of the produce of the land to the church. This duty in time became legally binding.

The tithes payable to a rector were called "great tithe," those payable to a vicar were "small tithe."

Originally this payment was made "in kind," *i.e.* every tenth shock of corn and every tenth egg, etc., were paid over; but agreements were frequently made for commuting those payments for more definite payments in kind; *e.g.* one fifth of the hay instead of one tenth of many other things. This was called a "modus decimandi," or, more shortly, a "modus."

*Now by the Tithe Commutation Acts* (*t*) tithe is commuted in all cases for a fixed annual sum of money varying with the average price of corn during a certain period (*u*), and called a "tithe-rent charge" (*x*).

The tithe rent-charge has now in many cases been redeemed by the payment of a lump sum, but otherwise is still payable out of the produce of all land which was formerly titheable.

The owner of the land is not under any personal liability to pay the tithe-rent charge: the remedy of the tithe-owner is by distraint of any of the produce of the land: he can also in some cases take possession of the land, or obtain the appointment of a receiver (*y*). The right to tithe may be bought and sold, and is conveyed like other real estate. The owner of the great tithe is liable for the repair of the chancel of the church. Tithe is rent within the Real Property Limitation Act (*z*).

(*s*) S. 1 (2).

(*t*) See Williams, "Real Property," 23rd ed., p. 487, note (*p*).

(*u*) By Tithe Act, 1918, 8 & 9 Geo. 5, c. 54. Tithe payable before 1926 based on seven years' average up to January, 1918. After 1st January, 1926, 15 years' average.

(*x*) A rent-charge commuting a *modus* does not vary.

(*y*) See *Ecclesiastical Commissioners* v. *Upjohn*, [1913] 1 K. B. 501.

(*z*) *Asplin* v. *Pullin*, [1916] W. N. 400.

# CHAPTER XXVI.

## COPYHOLDS.

### SECTION I.

### *History of Copyholds.*

COPYHOLD tenure is founded on immemorial custom. The freehold is vested in the lord of the manor. In theory the tenant holds the land at the will of the lord; *i.e.* the lord could in theory turn him out at any moment; but by custom which has grown up from time immemorial, the tenant has practically a fee simple, subject only to certain rights and services due to the lord which have been fixed by the custom.

In early times the tenants were "*Villani*," or "villagers," and they performed services of an uncertain kind to the lord. These services were considered to be servile or unfree in nature, hence the "villeins" were looked upon as partly unfree, and "villein tenure" was contrasted with freehold.

The lord of the manor holds a court, presided over by the steward of the manor, and any dealings with the land are entered on the rolls of the court. Thus each tenant may have as his title deeds copies of such parts of the court rolls as refer to his land. Hence the name "tenure by copy of court roll," or "copyhold."

In early times the tenants were bound to attend the lord's court, and questions depending on the custom were decided at the court. Now the court is held, if at all, as a pure formality, and is attended only by the steward and any tenants who have business to transact at the court.

*Customary Freeholds* are lands held by copy of court roll, but not at the will of the lord. The freehold is in the lord and the services are usually similar to the services due to the lord by a copyholder, the chief difference being that customary freeholds are often transferred by deed of grant and admittance, instead of by surrender and admittance. (See below.)

## SECTION II.

### *Transfer of Copyholds.*

Copyholds are transferred *by a surrender* of the land to the lord and an *admittance* by him of the new tenant. The surrender and admittance take place in the lord's court (*a*); the tenant hands a rod (representing a twig from the land) (*b*) to the steward, and the steward hands the rod to the new tenant, to whom he is said to grant "seisin of the rod."

The land can be surrendered "to the use of" another person, or the copyholder can covenant that he will surrender it to another. This passes an equitable estate in the copyhold, but the legal estate cannot be acquired without *admittance* (*c*).

## SECTION III.

### *Estates in Copyholds.*

I. *Fee Simple.*—A fee simple estate in copyholds can be transferred by the tenant during his life, or by will, and if he dies intestate it descends to his customary heir.

In copyholds all the rules depend on the custom of the particular manor. The customs in different manors vary considerably, and it is therefore always necessary in dealing with copyholds to ascertain if there is any special custom.

(*a*) This is now frequently done "out of court."

(*b*) Now usually a pencil or a ruler.

(*c*) Trustees or executors can convey if they have a power of sale without admittance. *Sissons* v. *Chichester Constable*, [1916] 2 Ch. 75.

If there is no special custom the same rules of descent apply to copyholds as to freeholds.

*Services* due from a copyhold tenant in fee simple vary with each manor, but usually include—

1. *Fines.*—A fine is a sum of money payable to the lord on the admittance of every new tenant. Fines are either—

(*a*) Fixed by the custom, or

(*b*) Arbitrary.

Arbitrary fines do not depend entirely upon the will of the lord, but are limited to two years' *improved value* of the land.

The meaning of the phrase "improved value" is shown by the following case:—

*Halton* v. *Hassel* (1736), 2 Strange, 1042.

Hassel's predecessor was admitted tenant of land at a rent of £16 a year. By the custom of the manor the fine was 1½ times the value of the land. He then executed improvements on the land which increased its value to £50 a year. The lord of the manor claimed a fine of £75. Hassel pleaded that he was not liable for more than £24 (being 1½ times the original rent).

*Held*, the fine must be calculated according to the *improved* value, and he must pay £75.

2. *Reliefs*, or sums payable to the lord on the death of a tenant.

3. *Rent* is frequently payable.

4. *Suit of Court.*—The tenants are still bound in theory to attend the lord's court.

5. *Escheat.*—If a tenant dies without heirs and intestate, the land escheats to the lord of the manor.

6. *Minerals* usually belong to the lord.

7. *Timber* usually belongs to the lord; but he cannot enter on the land to work the mines or cut the timber without the permission of the tenant or a special custom.

The following case illustrates the rights of the lord and tenant respectively.

*Eardley* v. *Granville* (1876), 3 Ch. D. 826.

E was a copyhold tenant. The Crown was the lord of the manor. The Crown leased the mines to Earl G., who now claimed the right to use underground passages which had been made in the course of working out the coal, as a means of access to another mine.

*Held*, (1) The minerals are vested in the lord of the manor.

(2) There was a special custom in this manor enabling the lord or his lessees to enter on the land to take the minerals.

But, (3) when the minerals have been removed, the space which the minerals occupied belongs to the tenant of the copyhold.

Therefore Earl G. had no right to use the passage.

8. *Heriots.*—The lord has a right on the death of a tenant to take the best beast, or sometimes the best chattel.

This is supposed to be due to the fact that in early times the lord provided the tenant with a horse and armour, and claimed them back on his death.

The right is still exercised at the present day.

*Copestake* v. *Hoper*, [1907] 1 Ch. 366; C. A. [1908] 2 Ch. 10.

C was the lord of the manor; H held an ancient freehold of the manor "by fealty, suit of court, a quit rent of £1 0*s.* 10*d.* per annum, a relief of one year's rent and a heriot of his best beast on his death."

H died, having mortgaged the land.

The lord seized a bay gelding as his heriot.

The Court below held that the heriot was payable, but this was reversed in the Court of Appeal on the ground that H was not "seised," the legal estate being vested in the mortgagee.

A fee simple tenant of copyholds may not commit waste without the consent of the lord of the manor. If he commits waste, or fails to perform the services, he may forfeit his estate to the lord.

II. *Estates Tail.*—There are no estates tail in copyholds unless there is a special custom in the manor to allow entails.

The Statute de Donis only applied to freeholds, and not to copyholds: hence—

*The effect of a grant of Copyholds "to A and the heirs of his body"* is—

(1) If there is no special custom to entail, A takes a fee simple conditional, as he would have taken in freeholds before De Donis.

*I.e.* on the birth of issue A can sell the whole fee simple, but if he has no issue, he cannot bar the entail.

(2) If there is a custom to entail, A takes an estate tail.

An estate tail in copyholds can now be barred by a simple deed of surrender similar to a disentailing deed of freehold, but it *need not be enrolled* in the Central Office.

This was enacted by the Fines and Recoveries Act, 1833. Enrolment is unnecessary because all dealings with copyhold land are enrolled in the lord's court.

Before 1833 entails could be barred by—

(i.) Forfeiture to the lord, and a re-grant by him; this destroyed the estate tail, which was forfeited, and the lord then granted a new estate in fee simple.

(ii.) Customary recovery. This was similar to a recovery of freeholds.

III. *Estates for life* can be created in copyholds and are now subject to much the same rules as in freeholds; although in early times there were some differences.

*E.g.* estates *pur autre vie* never vested in the "general occupant," for the lord would take the land if there was no other tenant.

IV. *Leases* may be granted with the consent of the lord of the manor.

## SECTION IV.

### *Enfranchisement of Copyholds.*

A copyhold estate can be turned into a freehold estate by enfranchisement.

(1) *At common law.*—This can only be done if the tenant and the lord of the manor agree to enfranchise the land.

*The lord conveys the freehold* estate to the tenant free from all the services due to the lord, and the tenant pays usually a lump sum to the lord.

It is usual to reserve to the lord the right of escheat: for this cannot do the tenant any harm, being merely the right of the lord to take the land if the tenant dies intestate and without heirs.

The lord cannot grant a greater estate than he has himself. If, therefore, he is merely a tenant for life he cannot enfranchise the fee simple.

(2) *Under the Copyhold Act*, 1894 (*d*), enfranchisements can be made under this Act even if the lord has only a life estate or other estate less than the fee simple.

(*a*) *Voluntary enfranchisement.*—The tenant and the lord may agree to enfranchise the land for an amount to be fixed by agreement.

The land is conveyed in the same way as at common law, with the consent of the Board of Agriculture. And this mode of conveyance will pass all mines, etc., and the copyhold estate merges in the freehold so much so that an estate tail in copyhold becomes barred (*e*).

(*b*) *Compulsory enfranchisement.*—Either the tenant or the lord can compel the other to enfranchise the land.

(i.) *If the tenant compels* enfranchisement he must pay a lump sum of money to the lord.

(ii.) *If the lord compels* enfranchisement, the tenant may pay a lump sum or, if he prefers to do so, an

(*d*) 57 & 58 Vict. c. 46.
(*e*) *Re Hart*, 41 Ch. D. 547.

annual rent charge at the rate of four per cent. of the lump sum.

In either case, if the amount payable is more than one year's improved value of the land, the tenant has the option of paying the rent-charge (*f*).

In either case the amount is fixed by the parties or by the Board of Agriculture or by a valuer appointed by the parties.

If the lord refuses to convey, the enfranchisement may be effected by an award of enfranchisement granted and confirmed by the Board of Agriculture (*g*).

*Effect of enfranchisement.*—After enfranchisement the land which was formerly copyhold becomes freehold (*h*), and the freehold thus created is held by the tenant (who was the copyholder) for the same estate and subject to the same limitations and trusts as formerly affected the copyhold (*i*).

A right of way is extinguished by enfranchisement (*k*).

Thus, if copyholds were settled on A for life, with remainder to his sons in tail, and A causes the land to be enfranchised, the freehold will immediately vest in A for life with remainder to his sons in tail.

*Peculiarities of enfranchisements under these Acts.*

(1) They are independent of the title of the lord (*l*).

That is to say, if the person who acts as lord of the manor is not really entitled to the freehold, the enfranchisement remains valid, and the only right of the true lord of the manor is to claim the money which was paid or is payable by the tenant.

A person who purchases enfranchised freeholds is not therefore concerned to enquire as to the title of the lord of the manor, and he is not entitled to enquire into it (*m*).

(*f*) Copyhold Act, 1894, s. 8.
(*g*) S. 10.
(*h*) S. 21 (1).
(*i*) S. 21 (2).
(*k*) *Derry* v. *Sanders*, [1919] 1 K. B. 223.
(*l*) S. 21 (*d*).
(*m*) Conveyancing Act, 1881, s. 3 (2).

(2) They do not affect the lord's right to mines (*n*).

*I.e* the lord remains tenant in fee simple of the minerals under the land, unless there is an express provision to the contrary.

(3) They do not affect the tenant's right of common (*o*).

The tenant still retains any rights of common which he possessed before enfranchisement over the wastes of the manor.

(4) They do not destroy the lord's right of escheat.

On the death of the tenant without heirs and intestate, the land goes to the lord of the manor instead of the Crown (*p*).

## SECTION V.

### *Death of a Copyhold Tenant.*

As a general rule copyholds pass on the death of the copyhold tenant in the *same way as freeholds:* they may be devised by will, and pass to the heir on intestacy, and are subject to the debts of the tenant.

But these rules may be altered by the special custom of the manor, and there are also the following general *exceptions*—

(1) *Copyholds do not vest in the personal representatives.*—The Land Transfer Act of 1897 does not apply to copyholds, and therefore they pass direct to the customary heir. An equitable estate in copyholds does, however, pass to the executors under that Act.

*Re Somerville and Turner's Contract*, [1903] 2 Ch. 583.

Septimus Chatt conveyed the legal estate in certain copyhold land to a mortgagee, and thus became entitled to the equity of redemption (see p. 230), which is an equitable estate. He died in 1901, and his administratrix sold the land.

*Held*, an equitable estate in copyholds does pass to the personal representative under the Land Transfer Act, 1897, and the sale was good (*q*).

(*n*) Copyhold Act, 1894, s. 23. (*o*) S. 22.

(*p*) See the new scale of compensation, [1919] W. N. (1 Mar.), pp. 72-73.

(*q*) The beneficial interest passes to the customary heir. *Re Hudson*, [1908] 1 Ch. 655.

(2) *The estate of a trustee of copyholds does not pass to his personal representatives.*

The provision of the Conveyancing Act, 1881, which caused freehold estates to pass to the personal representatives on the death of a sole trustee, does not now apply to copyholds (*r*): and consequently the estate of the trustee passes to his customary heir, or to the person to whom he has devised the land by his will.

(3) There is *no curtesy* in copyholds *except by special custom.*

When such a special custom exists, the life estate of the husband is usually limited to *one half*, instead of extending to the whole of the lands.

(4) There is *no dower* in copyholds *except by special custom.* When such a custom exists the right of the widow is called "*Freebench.*"

(The widow being allowed her seat by the fireside after the death of the husband.) It is usually *one half* of the lands instead of one third.

The Dower Act, 1833, does not apply to copyholds.

*Smith* v. *Adams* (1854), 5 D. M. & G. 712.

B, who was an admitted tenant of copyholds, sold them to S, and surrendered the land to the use of S. Thus, S took an equitable estate.

S died, and his widow claimed freebench of one half by the special custom of the manor.

*Held*, the Dower Act does not apply to copyholds, therefore the widow cannot claim freebench out of equitable estate.

(5) *Seizure quousque.*—On the death of a tenant the lord of the manor may proclaim his death at the manor court three times: if the heir does not then claim the land, the lord may seize it *quousque* (="until" he appears).

In some manors the lord is entitled by the special custom to

(*r*) S. 30 of the Conveyancing Act, 1881, originally applied to copyholds, but this was repealed by s. 45 of the Copyhold Act, 1887, which is now replaced by s. 88 of the Copyhold Act, 1894.

seize it absolutely: but he cannot do this against an infant, a married woman, or a lunatic (*s*).

## SECTION VI.

### *Contingent remainders of Copyhold Lands.*

The same rules apply as in the case of freeholds, except that contingent remainders of copyhold were never liable to be defeated by merger, surrender, or forfeiture of the life tenant's estate: for the freehold was in the lord of the manor, and therefore the destruction of the particular estate did not create a gap in the seisin.

Hence the provision of the Act of 1845 as to contingent remainders did not apply to copyholds.

*Pickersgill* v. *Grey* (1861), 30 Beav. 352.

Freehold and copyhold lands were settled by will on T for life with remainder in trust for the sons of M with remainder to the heirs of the testator. T became the testator's heir and claimed that the contingent remainders to the sons of M had failed by the merger of his life estate in the fee simple before the sons of M had been ascertained.

*Held*, the contingent remainders in the freeholds had failed, but *not* the contingent remainders in the copyholds.

Merger took place in 1842 on the death of the testator, so that at the commencement of the 1845 Act the contingent remainder in the freehold had already failed.

But if the remainder is not ready to vest when the particular estate determines *by the death of the tenant for life* (*t*), the contingent remainder will fail unless it is saved by the Act of 1877 (see p. 159). Executory interests in copyholds are governed by the same rules as in freeholds.

Mortgages of copyholds will be dealt with on p. 245.

(*s*) 11 Geo. IV. & 1 Will. IV. c. 65, s. 9.
(*t*) *Habergham* v. *Vincent* (1793), 2 Ves. Jun., p. 214.

# CHAPTER XXVII.

## LEASEHOLDS.

LEASEHOLDS are estates created for a fixed term, or for a term which is limited to come to an end at or before some fixed date.

Thus, an estate for 1000 years is merely a leasehold, and so is a gift "to A for 100 years, if he shall so long live;" though a gift "to A for life" is a freehold.

A gift "to A during the joint lives of B and C" is sometimes called a lease for lives, but is in fact an estate *pur autre vie* and is a freehold.

*Leaseholds are personal property;* personal interests in land being connected with realty in their nature, they are called "chattels real."

Other forms of chattels real are mortgages (see Chapter XXIX.) and estates by elegit (see pp. 110 and 111).

### SECTION I.

### *Forms of Leasehold Interests.*

1. *Tenancy by sufferance.*—This is the smallest estate known to the law: it exists *when a tenant for a fixed number of years remains in possession after his lease has expired.* The landlord may turn him out or claim possession by an action of ejectment *without giving him notice.*

If the tenant "holds over," *i.e.* remains in possession without the consent of the landlord, he is liable to the landlord for double rent.

2. *Tenancy at will.*—This is a tenancy which may be determined at any moment, either by the landlord or by the tenant, upon giving notice.

The landlord, in this case, cannot bring an action of ejectment unless he has given the tenant notice to quit.

If a tenant at will pays rent to the landlord, quarterly, or yearly, or for any regular period of time the tenancy becomes a tenancy from year to year; but this rule does not apply if a contrary intention is shown.

Thus, if a person takes lodgings and pays rent weekly, the probability is that a weekly tenancy is created (*a*).

3. *Tenancy from year to year* or *yearly tenancy.*—This tenancy is created by a grant of land "from year to year": the tenancy then continues until it is terminated by notice to quit, given by the landlord, or notice to determine the tenancy, given by the tenant.

*Notice to determine a yearly tenancy.*

(1) *In case of agricultural land* at least one year's clear notice must be given, expiring at the end of a current year.

That is, a lease commencing from a particular day in the year can only end on the same day in some other year.

Thus, A grants land to B on a yearly tenancy, commencing at Christmas, 1906. B could not leave at Christmas, 1907, unless he gave notice immediately; and if, after the lease has commenced, he wished to leave at the earliest possible moment, he must give notice some time before Christmas, 1907, of his intention to leave at Christmas, 1908.

This provision is made by the Agricultural Holdings Act, 1908 (*b*).

(2) *In the case of other land*, at least half a year's

(*a*) *Huffel* v. *Armitstead*, 7 C. & P. 56.
(*b*) 8 Ed. VII. c. 28, repealing Agricultural Holdings Act, 1883, 6 & 47 Vict. c. 61, s. 33.

clear notice must be given, expiring at the end of a current year.

Thus, in the last example, if B gave notice before midsummer 1907, he could leave at Christmas, 1907: but, if not, he could not leave before Christmas, 1908; but he could give notice to do so at any time before midsummer, 1908.

If the lease commences on one of the usual quarter days, a half-year's (*i.e.* two clear quarters') notice must be given: if it commences on any other day, six calendar months' notice is required.

Thus, if a lease commenced on Lady Day (25th March), notice could be given in any year at any time before the 29th of September (Michaelmas): but if the lease commenced on the 26th of March, the notice could not (probably) be given after the 26th of September (*c*).

4. *A lease for a fixed term of years.*—There is no limit to the length of a lease for years: it may be for 2 years or for 2000 or more.

## SECTION II.

### *Creation of Leases.*

*A lease for three years or less may be created verbally or by writing,* provided the rent is substantial, that is, at least two-thirds of the full annual value of the land.

*All other leases must be by deed.*—By the Statute of Frauds, a lease must be in writing (unless it is for not more than 3 years at two-thirds of a rack rent) and a mere verbal lease takes effect as a tenancy at will only (*d*).

If the tenant pays rent, it will therefore become a yearly tenancy.

By the Real Property Amendment Act, 1845 (*e*), all leases which are required by the Statute of Frauds

(*c*) *Right* v. *Darby* (1786), 1 T. R. 159, at p. 163.
(*d*) 29 Car. II. c. 3, ss. 1 and 2.
(*e*) 8 & 9 Vict. c. 106, s. 3.

to be in writing, must be *by deed*, otherwise they are void *at law*.

Thus if a lease for more than three years is in writing, but not sealed, it is void "at law." It may, however, be enforced in equity as an agreement for a lease, for equity treats that as done which is agreed to be done.

Hence the present law in case of a lease for more than three years is as follows :—

(1) *If it is verbal*—it creates a lease at will only and cannot be enforced even in equity.

Unless there has been some definite act of part performance of the lease which proves that there must have been some agreement to grant a lease, or unless there was fraud which prevented the lease from being put into writing.

(2) *If it is in writing*—it does not give the tenant the legal estate; but he has an equitable estate in the lease, because equity will grant him specific performance of the landlord's agreement to give him a lease.

(3) *If it is by deed*—the tenant gets the legal estate for the term created by the lease.

*Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9.

In 1879 L agreed in writing to lease a mill to W for 7 years, the rent to be paid in advance. W took possession and paid rent quarterly.

In 1882 L demanded £1000, partly for rent already due and partly for rent in advance.

W claimed that the lease was void at law, and that he merely became a tenant at will, and having paid rent quarterly he was now a tenant from year to year, so that he was only liable for so much of the rent as was in arrear.

L claimed that as the lease was in writing either party was entitled to specific performance of the agreement for the lease contained in the writing, and that he was entitled to rent in advance.

*Held*, both parties must be treated in equity in the same way as if the lease had been actually granted, and L could claim rent in advance, and distrain for it.

A lease should always be under seal if for more than 3 years.

The student may wonder why a lease should ever be granted by deed, if a mere written lease can be enforced. The reason is as follows:—

When two innocent persons are defrauded by the owner of land, the person who has the *legal estate* will have the better title, by reason of the equitable maxim that "*where equities are equal, the law prevails.*"

Thus if A by an unsealed writing grants a lease to B for 99 years at a premium of £1000, and afterwards grants by deed a lease to C of the same land on the same terms, and C has no notice of the lease to B, C will have the better title to the lease. A *contract* for a lease for however short a time must be in writing, Statute of Frauds, s. 4.

*Interesse Termini.*—The grant of land for a term of years does not create a lease until the "lessee" takes possession.

Thus if A grants a lease for 21 years to B, and then grants a lease for 10 years to C to take effect after the end of B's lease, C cannot enter while B's lease lasts, and C has therefore merely an *interesse termini*, and has no estate in the land (*f*). He has a vested interest therein and not an executory one.

*Lewis* v. *Baker*, [1905] 1 Ch. 46.

B held land from A on a lease, of which 2 years remained. A then granted to B a lease for 73 years to commence from the end of the 2 years. B sublet the land to C for 21 years.

*Held*, during the 2 remaining years B had only an *interesse termini* for the 73 years and therefore had not the reversion on the lease for 21 years, and could not distrain for rent due from C.

Since the Statute of Uses, a lessee may be deemed to have taken possession without actual entry if the land is granted to the *use* of the lessee for a term of years.

*Lease by Estoppel.* If a person who has no estate in a certain piece of land, purports to grant a lease of

(*f*) *Mann Crossman, Ltd.* v. *Registrar of the Land Registry*, [1918] 1 Ch. 202.

that land to another, the lease is of course invalid; but if the grantor afterwards acquires the land, he is "estopped" or prevented from claiming that the lease was void.

Thus, in 1880 A granted to B for 20 years land which then belonged to A's father. In 1890 A's father died having devised the land to A in fee simple. A could not after 1890 say that the lease to B was bad, and, as no one else had any right to the land, B, in effect, got a lease for the remaining 10 years "by estoppel," and it became an actual legal lease.

But if the lessor had *some* interest in the land at the time of granting the lease, there is no estoppel (*g*).

Thus, in the last example, if before 1880 A's father had granted to A a lease of the land for 10 years, then, on the death of the father, A would not be estopped, and B would not have a legal lease.

B however would not be without a remedy, for he could sue A for specific performance of his agreement to grant a lease.

## SECTION III.

### *Termination of Leases.*

(1) *By notice.*—A tenancy at will may be determined at any time by notice.

A tenancy from year to year may be determined at the end of any year by notice if given within the proper time.

(2) *By lapse of time.*—A lease for a fixed period comes to an end at the expiration of that period without any notice.

(3) *By surrender or merger.*—The lease may be brought to an end by the lessee surrendering his lease to the landlord. This may be done in two ways—

(i.) *By express surrender.*—A tenant who has not assigned or sublet his interest can surrender it by deed

(*g*) *Doe* d. *Strode* v. *Seaton* (1835), 2 Cr. M. & R. 728.

to the person who has the *immediate reversion*. The lease will then *merge* in the reversion (*h*).

Thus, A, who has the fee simple, grants land to B for 50 years. If B surrenders his 50 years' term to A, the lease is destroyed.

But there can be no surrender to any person who has not got the *immediate* reversion.

Thus, A grants land to B for 50 years. B then sublets the same land to C for 30 years.

C cannot surrender to A because there is 20 years of B's term between his estate and A's estate. But C could surrender to B, and then B could surrender to A.

(ii.) *Surrender by operation of law.*—If, while the lease is still existing, the landlord grants a new lease (*i*) to the tenant, or if the tenant does anything which recognizes that the landlord has a right to deal with the land as if there were no lease, the first lease is deemed to have been surrendered.

The reason is that a landlord cannot grant a lease while there is an existing lease (he can only grant an *interesse termini*, see p. 197), and therefore if a new lease is granted and accepted it is assumed that the first lease has been given up.

(4) *By forfeiture.*—A lease generally contains a provision that if the lessee commits a breach of any of the covenants, the lease shall be determined and the landlord may re-enter.

A breach of covenant does not enable the landlord to re-enter unless there is an express proviso for re-entry (*k*).

If the lease contains a proviso for re-entry, a tenant who commits a breach of covenant can be ejected by the landlord, subject to the following modifications :—

(1) *Breach of a covenant to pay rent.*—A tenant who

(*h*) This of course can only be done with the consent of the landlord.
(*i*) That is, a new lease to commence *at once*.
(*k*) *Doe* d. *Wilson* v. *Phillips* (1824), 2 Bing. 13.

is ejected by the landlord for non-payment of rent may be relieved from the forfeiture provided—

(i.) he applies to the Court within 6 months after the ejectment (*l*), and

(ii.) he pays all arrears of rent, and

(iii.) it is equitable that he should be relieved.

*Howard* v. *Fanshawe*, [1895] 2 Ch. 581.

The tenant of a lease for 99 years borrowed money from H on the security of the lease. The tenant did not pay rent for 9 months. The landlord, F, claimed that the lease was forfeited. This would have caused great hardship to H, who would have lost his security.

*Held*, H may retain the lease on payment of the arrears of rent.

(2) In case of (*a*) *a covenant not to sublet or assign the lease*, or

(*b*) *A covenant in a mining lease to allow the lessor to enter and inspect the mines.*

If a tenant commits a breach of either of these two covenants he forfeits the lease, and has no right to relief.

*Imray* v. *Oakshette*, [1897] 2 Q. B. 218.

Lyons purchased a lease and paid a considerable premium for it. He did not know that a breach of covenant had already been committed by an assignment of it without leave.

*Held*, the lease was forfeited and Lyons had no remedy.

(3) In case of a *proviso for forfeiture on the bankruptcy of the tenant.*

If the landlord wishes to claim that the lease has been forfeited *within the first year* after the tenant becomes bankrupt, *he must give notice* of his intention to do so (as in No. 4 below), but when one year has passed, then if the lease has not been transferred by the trustee in bankruptcy, the landlord may re-enter without notice.

(*l*) Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76).

In cases where the continued solvency of the tenant is of great importance to the landlord, the landlord may re-enter without notice immediately after the bankruptcy (*m*). Such cases are leases of agricultural land, mines, public-houses, furnished houses, and other cases where the personal qualifications of the tenant are of importance.

(4) *In case of all other covenants.*—By s. 14 of the *Conveyancing Act*, 1881 (*n*), a lessor cannot take advantage of any proviso for forfeiture or re-entry until he has *served on the lessee a notice*—

(*a*) Specifying the breach he complains of, and

(*b*) requiring the lessee to remedy the breach if possible, and

(*c*) (in any case) requiring compensation in damages, and until *a reasonable time has elapsed* after the service of such notice.

The full text of these provisions will be found on p. 316. The four classes of covenants mentioned above numbered 1, 2*a*, 2*b*, and 3, are expressly excepted from this section.

By the same section (*o*), where a lessor is proceeding to enforce his right of re-entry the Court may grant the lessee relief, if it thinks fit, and a sub-lessee has a similar right to relief in case of the forfeiture of the head lease (*p*).

Another case of forfeiture may occur if the tenant denies the title of his landlord and claims the fee simple.

*Doe* d. *Ellerbrock* v. *Flynn* (1834), 1 C. M. & R. 137.

A was a lessee of E: F claimed the freehold and paid A 5*s*. A handed over the land to F.

*Held*, A's lease was forfeited.

On the termination of a lease the lessee has a right to claim from the landlord as compensation for improvements made by

(*m*) Conveyancing Act, 1892, 55 & 56 Vict. c. 13, s. 2 (2) and (3).
(*n*) 44 & 45 Vict. c. 41.
(*o*) 44 & 45 Vict. c. 41, s. 14 (2).
(*p*) Conveyancing Act, 1892, 55 & 56 Vict. c. 13, s. 4.

him, the full value of such improvements to an incoming tenant.

These improvements are of three classes—

(1) Buildings and similar permanent improvements for which compensation can only be claimed if erected with the consent in writing of the landlord.

(2) Drainage, which requires notice to the landlord.

(3) Manure and similar agricultural improvements, in which case no consent or notice is required (*q*).

## SECTION IV.

### *Transfer of Leaseholds.*

(*a*) *Assignment.*—When the tenant transfers his whole interest in the lease, he is said to assign it.

Thus, in 1880 A granted land to B for 50 years. In 1900 B transferred the residue of the term of 50 years (= 30 years) to C. C is an assignee.

The assignee of a lease stands in the place of the original lessee and becomes a tenant of the original landlord.

(*b*) *Sub-lease* (or *underlease*).—When the tenant transfers to another a part of his interest, he is said to sub-let it.

Thus, if in the last example B had in 1900 leased the land to C for a term of 20 years only, C would be a sub-lessee.

Even if B had transferred to C the whole remaining 30 years of his term *except the last day*, C would be a sub-lessee.

A sub-lessee is not a tenant of the original landlord; but he is a tenant of the sub-lessor (*i.e.* the original lessee).

*Result of this distinction.—An assignee of a lease is liable to the original landlord* to perform the covenants in the lease (or such of them as "run with the land," see below).

(*q*) Agricultural Holdings Act, 1908, 8 Ed. VII. c. 28.

Since the assignee holds his estate as tenant of the original landlord there is said to be "*privity of estate*" between them.

There is privity of estate between two persons whenever one is tenant of the other.

*The assignor, however, also remains liable* to the original landlord; for he cannot get rid of his liability to perform the contract which he made with the landlord. The original lessee actually made a contract with the landlord; there is said therefore to be "*privity of contract*" between them.

Thus the landlord may sue either the assignor or the assignee. If the assignor is sued the assignee must indemnify him. There is an implied covenant by each assignee to indemnify the lessee for breaches of covenant whilst he is assignee (*r*).

When there is no "privity of estate" and no "privity of contract" between two parties, neither can sue the other on the covenants.

Thus (1) *An assignee who assigns the lease to another is not liable* for breaches of covenant which occur after he has assigned.

For he made no contract with the original lessor, and he no longer has any estate in the land. Therefore there is no privity of contract and no privity of estate.

(2) *A sub-lessee is not liable to the original landlord* to perform the covenants in the original lease.

For he is not tenant of the original landlord, and he did not make any contract with the landlord.

A sub-lessee is liable to the sub-lessor on the covenants in the sub-lease.

For the sub-lease contains an express contract between the sub-lessor and the sub-lessee.

Covenants in a lease which are binding on the transferee are said to "*run with the land*"—that is,

(*r*) *Moule* v. *Garrett*, L. R. 5 Exch. 132.

they pass to the assignee of the lease and bind him without any further express covenant on his part.

## SECTION V.

### *Covenants which run with the land.*

I. *Personal covenants never pass* (*s*).—If the lease contains covenants which do not refer to the land which is leased (or "demised"), and are merely personal to the lessee, and the lessee transfers the lease, the transferee is not bound by the covenants unless he expressly agrees to perform them.

Thus A, a tailor who carried on business in Oxford and Cambridge, sold his Cambridge business to B, and leased his Cambridge shop to B.

B covenanted that he would not carry on business as a tailor in Oxford. If B assigned his lease to C, C would not be prevented from carrying on business in Oxford. For B's covenant did not relate to the Cambridge shop which was leased.

II. *Covenants which relate to the land leased.*

These are usually described in legal documents as "covenants which touch and concern the thing demised."

A. *On a sub-lease, never pass.*—As we have seen, the sub-lessee cannot sue or be sued by the original landlord.

B. *On an assignment of a lease.*—(1) *Negative* covenants and covenants *as to things already in existence* on the land bind the assignee.

Thus, a covenant *not* to use the house which is leased for any particular business is binding on the assignee.

If the Oxford tailor leased a house in Oxford to D, and D covenanted that he would not carry on the business of a tailor

(*s*) *Dewar* v. *Goodman*, [1908] 1 K. B. 94.

*in that house;* and D afterwards assigned the lease to E, E would be bound by the covenant.

So also a covenant to keep an existing house in repair is binding on him.

These covenants bind the assignee whether he has notice of them or not.

(2) Covenants *as to things not in existence* on the land *do not pass, unless the original lessee covenanted for himself "and his assigns."*

Thus A grants vacant land to B for 99 years, and B covenants that he "and his assigns" will build a house on it. B assigns the lease to C. C is bound to build the house.

But if the words "and his assigns" had been omitted from the lease, C would not be bound.

*Spencer's Case* (1583), 5 Coke, p. 16; 1 Sm. L. C., 11th ed., p. 55.

Spencer leased a house to S for 21 years, and S covenanted for him, his executors, and administrators that he would build a brick wall on the land. S assigned the lease to J, and J assigned it to Clark.

Spencer sued Clark for not building the wall.

*Held*, Clark is not liable on the covenant.

He would have been liable if S had covenanted for himself and his assigns.

C. *On an assignment of the reversion.*—If the *landlord* transfers his interest, the new landlord can sue or be sued upon the covenants in the lease, provided they relate to the land.

This is provided by a statute of Henry VIII. (*t*).

*Clegg* v. *Hands* (1890), 44 Ch. D. 503.

Clegg & Co. were brewers. They let a public-house to Hands, and Hands covenanted that he would not sell *on the premises* any beer which was not purchased from Clegg & Co. and their assigns.

Clegg & Co. assigned the reversion to Cain.

(*t*) 32 Hen. VIII. c. 34.

*Held*, Hands cannot sell beer purchased from any person except Cain. Compare this case with *Thomas* v. *Hayward* (*u*), where the covenant was not to keep a public-house *within half a mile* of the premises, and it was held not to be binding after an assignment.

III. *Covenants binding in equity* (*x*).—*On a transfer of any estate* (whether by assignment or sub-lease of a term, or by conveyance of a freehold) *negative* or *restrictive* covenants relating to the land are binding in equity on any person who acquires the land except a *bonâ fide* purchaser of the legal estate who has no notice of the covenants.

These covenants do not "run with the land" at law, but if a person takes the land with notice that there are negative covenants, restricting his enjoyment of the land, he is not allowed to break the covenants.

Thus the rule is—

(1) *Negative covenants* are binding on each person who acquires the land unless he is a purchaser for value of the legal estate without notice of the covenants (*y*).

*Tulk* v. *Moxhay* (1848), 2 Ph. 774.

Tulk sold the central part of Leicester Square to Elms, and Elms covenanted not to build on the land. The land was afterwards sold to Moxhay, who knew of this covenant, but proceeded to build.

*Held*, Moxhay is bound by the covenant because it would be inequitable that Elms, who gave a small price for the land because of the restrictions, should be able to sell it for a larger price free from the restrictions.

The purchaser is bound even if he has only *constructive notice* of the covenants.

(*u*) (1869), L. R. 4 Exch. 311; and see Anson on Contracts, p. 308, 15th ed.

(*x*) This subject is dealt with here merely for convenience and for purposes of contrast; its operation is not confined to leaseholds.

(*y*) *Nisbet and Potts' Contract*, [1906] 1 Ch. 386.

Thus, Moxhay would have been bound even if he had not actually known of the covenants, if he had not made proper inquiries; for a purchaser of land is said to have "*constructive*" *notice* of anything which he would have discovered if he had made a proper investigation of title.

A sub-lessee is for this reason deemed to have notice of the contents of the head lease, and is therefore bound in equity by any negative covenants contained in it.

(2) *Positive covenants* (or covenants *to spend money on the land*) do not bind a purchaser, even if he has notice of them.

*Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 570.

Austerberry (*z*) sold land to X, and X covenanted to repair a road which ran through part of the land which was retained by Austerberry. X sold his land to the corporation, who knew of his covenant. The corporation then served a notice on Austerberry requiring him to repair the road. He replied that the corporation were themselves bound to do the repairs because of the covenant made by X.

*Held*, the corporation are not bound.

(*Note.*—Austerberry could sue X for damages for breach of his covenant to repair.)

*Severance of Reversion.*—At common law if the landlord assigned part of the land subject to a lease the right of re-entry for breach of covenants in the lease could no longer be enforced (*a*). But by Lord St. Leonards' Act (*b*), where the reversion upon a lease is severed, and the rent is apportioned, the assignee of each part of the reversion can enforce his right of re-entry for non-payment of his portion of the original rent. This Act did not, however, apply to a right of re-entry for breach of other covenants. Where the severance of the reversion is caused by operation of law and not by the voluntary act of the landlord the right of re-entry was still enforceable (*c*).

(*z*) The sale was in fact made by the predecessor in title of Austerberry.

(*a*) Williams, "Real Property," 23rd ed., p. 564.

(*b*) Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 3.

(*c*) *Piggott* v. *Middlesex County Council*, [1909] 1 Ch. 134.

## SECTION VI.

### *Succession to Leaseholds on Death.*

Leaseholds being personal property have always vested in the personal representatives on the death of the lessee. They are freely transferable by will, but if the tenant dies intestate, his interest in the lease passes to his personal representatives in trust for his next of kin.

The personal representatives are bound by the covenants in the lease, but they can in most cases get rid of their liability to perform the covenants by assigning the lease, as follows (*d*).

(1) If the deceased tenant was an assignee of the lease his personal representatives can get rid of their liability by assigning the lease even to a pauper.

(2) If the deceased tenant was the original lessee, his personal representatives remain liable even after they have assigned the lease. But this liability may be modified as follows :—

(*a*) In case of the covenant to pay rent, the personal representatives are not liable for more than the value of the assets of the deceased.

(*b*) In case of covenants to repair and similar covenants, the representatives are liable if they have taken possession of the land, even if there are no assets ; but by an act of 1859 (*e*) if the representatives—

(i.) Satisfy all existing claims ;

(ii.) Set aside a sufficient sum to meet ascertained future liabilities ;

and (iii.) assign the lease to a purchaser, they are freed from liability.

If, however, a purchaser cannot be found, there seems no way of destroying their liability.

## SECTION VII.

### *Long Terms of Years.*

Long terms, usually for 300, 500 or 1000 years, are most frequently found in marriage settlements.

(*d*) See Woodfall, "Landlord and Tenant," 19th ed., pp. 338–342.
(*e*) 22 & 23 Vict. c. 35, s. 27.

As we have seen, the land is usually settled on the father for life, with remainder to his eldest son in tail; this leaves nothing for the other sons and daughters, and therefore it is usual to provide that sums of money shall be paid to them out of the land. It is best for the son to have the legal estate in tail, and if this is desired the land cannot be mortgaged to the other children in the usual manner (see p. 223); consequently the land is leased to trustees for a term which shall be more than sufficient to cover the lives of all possible children of the father, and the trustees hold this lease or term for the purpose of raising and paying the money to the younger children.

Terms created in this way are called "portions terms."

Example.

On the marriage of A and B, land is conveyed to X and Y and their heirs to the use of A and his heirs until the marriage.

Then to the use of A for life.

Remainder to the use of C and D (two other trustees) for 1000 years upon trust to secure the payment of £5000 to younger children of A.

Remainder subject to the term to the use of the first son of A in tail, etc. (see the form of a settlement on p. 331).

Nominally the eldest son gets only a fee tail in reversion after the termination of the 1000 years; but really he is *seised* immediately on the death of the father, and holds the land subject only to the payment of the £5000.

The object of the term therefore is to secure provision for the younger children without impairing the continuance of an estate in the head of the family.

*Satisfied Terms.—When the purpose for which such a term was created has been satisfied* (*e.g.* when the £5000 has been paid) *the term ceases.*

This was enacted by a statute of 1845 (*f*).

*Before the Act* the settlement sometimes provided

(*f*) 8 & 9 Vict. c. 112.

that the term should cease when the money was paid; this was called a "proviso for cesser"; but if not, the term of 1000 years continued to exist until the trustees (C and D) conveyed it back to the tenant in tail.

This led to a complicated and inconvenient conveyancing practice called *the assignment of a satisfied term on trust to attend the inheritance.*

Suppose in the last example that A dies and his son, S, thereupon becomes entitled to an estate tail; S bars the entail and becomes tenant in fee simple subject to the term of 1000 years to *provide portions* of £5000 for his brothers and sisters.

S now agrees to sell the land to a purchaser for £20,000, of which £5000 is to be paid to C and D to clear off the charge.

The simplest course would be for S to convey the fee simple to the purchaser, and for C and D to assign the 1000 years' term to the purchaser. The term would then merge and cease to exist. This, however, was not usually done, for the following reason:—

A cautious purchaser of land subject to a term wished the term to be kept alive for the purpose of protecting him from possible charges or incumbrances created since the commencement of the term.

Thus, suppose S, after barring the entail, had raised £500 by mortgage of the land, without the knowledge of the purchaser. As S had then *in law* only a reversion, expectant on the termination of the lease for 1000 years, he could not bind anything but the reversion. That is to say, the lender of the £500 would have a charge on the land *after the termination of the term* of 1000 years.

If then the purchaser could keep the term on foot, the £500 mortgage would be postponed for 1000 years (*g*).

Therefore the purchaser had the fee simple conveyed to *himself*, and had the lease assigned to *trustees for him*, so that the term of years and the fee simple were not held "in the same right," and the term did not

(*g*) The mortgage for £500 would no doubt be an equitable charge on the whole interest of S: but it would not bind the *legal estate* except subject to the term: and a purchaser for value is not bound by an equitable charge of which he has no notice.

therefore merge in the fee simple : thus the purchaser escaped liability for any incumbrances created since the beginning of the term of which he had no notice.

This term was held by the new trustees upon trust for the persons who should from time to time be entitled to the fee simple ; hence it was said to be " on trust to attend the inheritance."

Similarly, if S had paid off the £5000 himself, the trustees would hold the term on trust for him and his heirs and assigns.

*By the Satisfied Terms Act*, 1845.

(1) *Any term becoming satisfied after the Act immediately ceases* (whether it was expressly made to attend the inheritance or only became so attendant by operation of law, as where S paid off the charge).

It was thought, however, that a purchaser who had taken this precaution before the Act should not be deprived of the protection which the term afforded him, consequently it was enacted that—

(2) Any term which became satisfied before the Act should also cease ; but if it was made attendant on the inheritance by express words (as in the example above) it should be deemed to be still on foot for the purpose of protecting the purchaser from any incumbrances which were then postponed by the existence of the term. Hence the law at the present day is that a term created for the purposes of a mortgage ceases when the mortgage is paid off or extinguished ; but if it was created before 1845 it may still exist for certain purposes (*h*).

It is still sometimes useful as a protection against the possibility of the widow of some owner being entitled to dower.

(*h*) For the full text of this section, see p. 309. The only person who can now be protected by such a term is a *bonâ fide purchaser for value*, and he can only claim such protection if the persons who held the legal estate in the term in 1845 would now be holding it in trust for him if the term had not ceased. Sugden, " Vendors and Purchasers," 14th ed., pp. 622, 623. *Plant* v. *Taylor* (1861), 7 H. & N. 211, p. 236.

*Enlargement of a long term.*

A person who holds land for 1000 years and pays no rent, or the rent of, say, one peppercorn each year, has practically a fee simple; and he can now turn his estate into a fee simple.

*By the Conveyancing Act*, 1881 (s. 65).—When a person holds a term of years which (1) was *originally created for at least* 300 *years*, and (2) has *at least* 200 *years still to run*, and (3) is *subject to no rent*, or to a rent of *no money value*, and (4) is subject to *no trust or right of redemption* in favour of the reversioner, the tenant may by executing a deed poll enlarge the term into a fee simple.

Note that until he exercises this right he only has a term of years, which is personal property: but when he has exercised it he gets a fee simple, which is real property.

A rent of one silver penny has been held to be a rent of no money value (*i*); but a rent of 3 shillings prevents the tenant from enlarging his term (*k*).

(*i*) *Re Chapman & Hobbs* (1885), 29 Ch. D. 1007.
(*k*) *Re Smith & Stott, ibid.*, 29 Ch. D., p. 1009 (*n*).

## FORM OF A LEASE (*l*).

This is not intended as a precedent to be copied, but is merely an example of an existing lease.

**This Indenture** made the third day of May 1906 BETWEEN AMBROSE FITZGERALD of Kingslear Felpham in the County of Sussex Esquire (hereinafter called the Lessor) of the one part and JAMES ARTHUR SMITH of 59 Welbeck Street Hampstead in the County of London Builder (hereinafter called the Lessee) of the other part Witnesseth that in consideration of the rent and Lessee's covenants hereinafter reserved and contained the Lessor Doth demise (*m*) unto the Lessee his executors administrators and assigns ALL THAT (*n*) Messuage or tenement known as No. 303 High Street Hampstead aforesaid together with the shop and garden ground usually occupied therewith (*o*) TO HOLD the said premises hereinbefore expressed to be demised with the appurtenances unto the Lessee his executors administrators and assigns from the 24th day of June 1906 for the term of twenty-one years (*p*) YIELDING AND PAYING therefor yearly during the said term the rent of £97 sterling by equal quarterly payments on the 25th day of March the 24th day of June the 29th day of September and the 25th day of December the first of such payments to be made on the 29th day of September next and the last payment to be made in advance

(*l*) The student should read through this form in order to render the matters dealt with in the foregoing chapter more tangible and interesting.

(*m*) The word "Demise" is important, as it implies a covenant for quiet enjoyment. See p. 286.

(*n*) The description of the property is called the "parcels."

(*o*) This is called the "habendum."

(*p*) This is called the "reddendum."

seven days before the expiration of the said term *And the Lessee doth hereby* for himself and his assigns *covenant* with the Lessor in manner following that is to say That he the Lessee his executors administrators and assigns will during the said term *pay the rent* hereby reserved at the times and in manner hereinbefore mentioned And also *will pay* all taxes rates duties assessments and *outgoings* (*q*) whatsoever whether *parochial parliamentary* or otherwise now charged or hereafter to be charged upon the said demised premises or any part thereof or upon the rent thereof or any part thereof or upon the Lessor his heirs or assigns in respect thereof *except landlord's property tax* (*r*) And also will during the said term keep the said demised premises and all fixtures and additions thereto in good and substantial *repair* (*s*) and condition And also will in every third year of the said term paint all the outside woodwork and ironwork belonging to the said premises with two coats of proper oil colours in a workmanlike manner And also will in every sixth year of the same term *paint* the inside wood iron and other works now or usually painted with two coats of proper oil colours in a workmanlike manner and also wash stop whiten or colour such parts of the said premises as are now plastered And also will during the said term *keep insured* (*t*) the said premises hereby demised to the amount of £900 at least in some respectable fire insurance office and will

(*q*) The word "outgoings" is very wide and includes the cost of reconstructing the house or drainage under the order of a local authority. *Stockdale* v. *Ascherberg*, [1904] 1 K. B. 447.

(*r*) Any agreement by a tenant to pay property tax or tithe rent charge is void. *Lord Ludlow* v. *Pike*, [1904] 1 K. B. 531.

(*s*) The lease usually contains an express covenant to repair, although apart from express covenant the tenant would be bound to do so.

(*t*) If the landlord is to insure the property, the lease should provide that in case of destruction by fire the rent shall cease to be payable unless the house is rebuilt within (say) 3 months. Otherwise the tenant must continue to pay rent though the house is destroyed. *Baker* v. *Holtpzaffell* (1811), 4 Taunt. 45. As to the application of the insurance money when the tenant insures, see *Leeds* v. *Cheetham* (1827), 1 Sim. 146, and (in London) 14 Geo. III. c. 78, s. 83.

upon the request of the Lessor or his heirs or assigns or of his or their agent show the receipt for the last premium paid for such insurance for every current year and as often as the said premises hereby demised shall be damaged by fire or other accident insured against all the moneys which shall be received by the Lessee his executors administrators or assigns in respect of such insurance shall be expended by him or them in rebuilding or repairing the said demised premises or such parts thereof as shall be so damaged And it is hereby agreed that it shall be lawful for the Lessor his heirs and assigns and all persons authorized by him or them at all reasonable times during the said term to *enter* the said premises to *examine the condition* of the said premises and further that all defects and wants of reparation contrary to any of the covenants hereinbefore contained which upon any such view shall be found and for the amendment of which notice in writing shall be left at the premises the Lessee his executors administrators and assigns will within three calendar months next after every such notice well and sufficiently repair and make good And also that the Lessee his executors administrators and assigns *will not use or suffer to be used the said premises or any part thereof as a shop* warehouse or other place for carrying on any trade or business whatsoever or otherwise than as a private dwelling-house without the consent in writing of the Lessor his heirs or assigns And *will not without the like consent assign* (*u*) or *underlet* the said premises or any part thereof Provided always and it is hereby expressly agreed by and between the parties hereto that such consent as last aforesaid shall *not be withheld without some reasonable objection* (*x*) to the respectability or responsibility of the proposed assignee or sub-lessee

(*u*) This is important, as no relief will usually be given to the tenant if forfeiture is incurred by a breach of this covenant.

(*x*) If the landlord refuses his consent unreasonably, the tenant may assign without consent. *Bates* v. *Donaldson*, [1896] 2 Q. B. 241.

And further that the Lessee his executors administrators or assigns will at the *expiration* or other sooner determination of the said term peaceably *surrender and yield up* unto the Lessor his heirs or assigns the said premises hereby demised with the appurtenances together with all buildings erections and fixtures now or hereafter to be built or erected thereon in good and substantial repair and condition in all respects PROVIDED ALWAYS (*y*) and it is expressly agreed that if *the rent hereby* reserved or any part thereof shall be in arrear for *twenty-one* days (whether lawfully demanded or not) or if there shall be a breach of any of the Lessee's covenants herein contained or if the Lessee his executors administrators or assigns shall while the said premises shall remain vested in him or them be adjudicated bankrupt or if his or their interest shall be taken in execution then and in any of such cases it shall be lawful for the Lessor his heirs and assigns *to re-enter* upon the said premises and thereupon the said term shall absolutely determine And the *Lessor doth hereby covenant* (*z*) with the Lessee that he may *peaceably enjoy* the said demised premises for the said term hereby granted *without any interruption* or disturbance (except in accordance with the power of entry to view or with the proviso for re-entry hereinbefore contained) *from or by the Lessor his heirs or assigns or any other person or persons lawfully claiming by from or under him them or any of them* In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

A. Fitzgerald.

Witness to the signature of
Ambrose Fitzgerald—Peter Brown
of 59 Oddfellows Row E.C. Clerk.

SEAL.

(*y*) This is a proviso for forfeiture, as to which see p. 199.

(*z*) This express covenant is put in to exclude the implied covenant which arises by use of the word "demise." See p. 286.

## CHAPTER XXVIII.

### CHATTELS WHICH DESCEND AS LAND.

*Heirlooms.*—Heirlooms are chattels which, by force of a special custom, descend with land, *e.g.* Crown jewels.

Thus, heirlooms cannot, as a rule, be created now, for a custom is not binding unless it is immemorial.

*Settled Chattels and Leaseholds.*—Sometimes chattels are settled upon trusts to follow certain freehold land, and are loosely but not correctly called heirlooms. They cannot be bound to follow the land absolutely for more than the lives of existing persons and their children. The reason of this is as follows :—

The freehold land is usually settled on A for life, with remainder to his first and other sons in tail.

But it is impossible to create an estate tail in personal property.

Thus, if leasehold land or chattels were settled on A for life, remainder to his first and other sons in tail, on the death of A the leaseholds or chattels would vest in the eldest son *absolutely*.

Consequently, if the son died under 21, the freehold land would go to the next brother, but the leaseholds and chattels would be divided amongst all the brothers and sisters equally as his next of kin.

Hence settlements of leaseholds or chattels to go with freehold land usually provide that they shall not become absolutely vested in any tenant in tail of the land unless he shall reach 21, and if he shall die

under 21 the leaseholds and chattels shall go to the next person entitled to the land.

If this were to apply to every tenant in tail who might hereafter be born, it would be void as a perpetuity: hence it must only apply to tenants in tail who are children of persons living when the settlement is made (*a*).

Usually life estates are given by the settlement to all the sons who are then living, and estates tail are given to their sons. Therefore the restriction will be confined within proper limits if it is confined to persons to whom estates tail are given *directly* by the settlement, excluding all those who take by *descent* from another tenant in tail, *i.e.* if it is confined to "purchasers" (*b*).

This object is attained and the restriction is kept within the rule against perpetuities by using the following words:—"Provided that the leaseholds (or chattels) shall not vest in any tenant in tail *by purchase* until he reaches 21."

*Title Deeds.*—Deeds relating to any land and the boxes in which they are usually kept pass to the person entitled to the land from time to time.

*Fixtures.*—The old common law rule was that everything which became fixed to the land belonged to the owner of the land. "*Quidquid plantatur solo, solo cedit.*"

Many exceptions to this rule have since grown up, until the words "*tenant's fixtures*" have come to mean chattels fixed to the soil which may be removed by a tenant, and "*landlord's fixtures*," chattels which pass to the owner of the land.

The question whether chattels have become part of the land or not arises in three classes of cases—

(1) On the death of a tenant in fee simple, *between the heir* or other persons entitled to his land, and his *next of kin* or other persons entitled to his personal property.

(*a*) *Re Atkinson*, [1915] W. N. 388. (*b*) See p. 6.

This is a question of intention. The presumption is in favour of the heir, *i.e. primâ facie* the chattels are part of the land (*c*).

(2) On the death of a *tenant for life*, between his executors *and the remainderman* entitled to the land.

This again is a question of intention. The presumption, however, is different, for the tenant for life naturally is not presumed to have intended to make a present of the chattels to the remainderman.

*Re Hulse*, [1905] 1 Ch. 406.

The tenant for life of land put up some fixed machinery.

*Held*, in the absence of proof that the tenant for life intended to make a present to the remainderman, the machinery belonged to the tenant for life, and passed to his executors on his death.

(3) Between *Landlord and Tenant*.—All fixtures belong to the landlord except those which are excepted by the rules of common law, or the Agricultural Holdings Act, and some other statutes.

(A) *Common Law Exceptions*.—The tenant is entitled to remove any fixtures put up for the purposes of—

(1) *Trade*.

*Penton* v. *Robart* (1801), 2 East, 88.

The tenant erected a shed for making varnish.

*Held*, he may remove it.

(2) Ornament, or

(3) Domestic convenience;

But he must remove them before the end of the lease, and must not damage the freehold (*d*).

Agriculture was held not to be a trade, and therefore tenants could not remove buildings and fixtures put up for the purposes of agriculture.

(*c*) *Re Whaley*, [1908] 1 Ch. 615.

(*d*) As to the effect of a surrender and a new lease on the right to remove fixtures, see *Leschallas* v. *Woolf*, [1908] 1 Ch. 641.

*Elwes* v. *Maw* (1802), 3 East, 38.

The tenant erected a "beaste-house" made of wood on a brick foundation.

*Held*, he could not remove it.

(B) *By the Agricultural Holdings Act*, 1908 (*e*).—In the case of Agricultural holdings, where a tenant affixes to his holding any engine, machinery, or other fixture, or erects any building, it *becomes the property* of *the tenant*, and *he may remove it* before or *within a reasonable time after* the termination of the tenancy.

But (1) he must not do any avoidable damage; (2) he must make good all damage done; (3) he must give one month's notice of his intention to remove it; and (4) the landlord may purchase the fixture at a sum which would be a fair price to an incoming tenant.

The tenant must, of course, pay his rent and perform the other covenants under the lease before he can remove any fixtures; and he cannot remove them if he has put them up in the place of fixtures belonging to the landlord which he has removed, or if he is entitled to compensation for the fixtures as improvements under s. 10 of the Act (see pp. 201, 202, *ante*).

The Act also provides for compensation to be paid to the tenant for damage done by game, and provides that all covenants restricting the method of cultivation shall be void. And if the landlord gives the tenant notice to quit without good cause, or puts up his rent because of improvements made by the tenant, the landlord must pay special compensation for the loss suffered by the tenant by being obliged to quit his holding (*f*).

Further, where any tenant has made any improvement on his holding of the kind specified in the Act, he is entitled at the determination of his tenancy on quitting his holding to obtain from the landlord as compensation under this Act for the improvement such sum as fairly represents the value of the improvement to the incoming tenant (*g*), but compensation under the Act is not payable in respect of any improvement comprised in Part I.

(*e*) 8 Ed. VII. c. 28, s. 21.

(*f*) S. 11.

(*g*) S. 1 (1).

of the First Schedule, unless the landlord of the holding has previously to the execution of the improvement, consented in writing to the making of the improvement, and any such consent may be given by the landlord unconditionally, or upon such terms as to compensation or otherwise as may be agreed upon between the landlord and the tenant, and, if any such agreement is made any compensation payable under the agreement shall be substituted for compensation under this Act (*h*).

(*h*) S. 2.

# CHAPTER XXIX.

## MORTGAGES.

### SECTION I.

### *Form and Effect.*

A MORTGAGE is a transaction by which a tenant of land can borrow money on the security of his land.

The borrower is called the *mortgagor*.

The lender is called the *mortgagee*.

The safest and most usual form of mortgage of land is a legal mortgage in which the legal estate is conveyed to the mortgagee (lender), but the mortgagor (borrower) is allowed to remain in possession, and the mortgage is treated merely as a security for the money lent.

The position of a mortgagor is curious, and can only be explained by reference to the history of the law.

*At Common Law.*—The borrower conveyed his land absolutely to the lender, but subject to a proviso that if the borrower repaid the money within six months with interest the lender would re-convey the land to the borrower.

If the money was not re-paid within the six months, the land belonged absolutely to the lender.

*In Equity.*—It was considered unfair that the borrower should lose his land entirely if he failed to pay within the six months, and equity would compel the lender to re-convey the land if the money was re-paid with interest even after the six months.

The result is that, after the first six months, though the lender has an absolute estate at law, the borrower can get his property back on payment of the amount lent with interest.

When money is lent on mortgage it is not usually intended to be re-paid within six months, but is intended as a permanent investment, the borrower, however, relies on the equitable rule and conveys his land in the old Common Law form.

A summary of this form will be found on the following page.

## FORM OF A MORTGAGE.

This is not intended as a precedent, but is merely an outline of ordinary mortgage. A full form of mortgage deed will be found on p. 325.

**This Indenture** made the 6th day of March, 1907.

*Between Archibald Fitzgerald*, of No. 273, St. James Street, in the County of London, Esquire (the mortgagor), of the one part and *Louis Moses*, 162, Furnival Street, in the City of London, gentleman (the mortgagee), of the other part.

*Whereas* A. Fitzgerald is seised in fee simple of the land hereinafter described,

*And whereas* L. Moses has agreed to lend him £500,

*Now this Indenture witnesseth* that in consideration of the sum of £500 now paid by L. Moses to A. Fitzgerald (the receipt whereof A. Fitzgerald acknowledges) A. Fitzgerald covenants to repay the £500 with interest at 4 per cent. per annum on the 6th day of September, 1907.

*And this indenture also witnesseth* that for the consideration aforesaid A. Fitzgerald, as beneficial owner, hereby conveys to L. Moses

*All that* freehold house known as "Woodside," situated, etc.

*To hold* the same unto and to the use of L. Moses in fee simple.

*Provided always* that if A. Fitzgerald shall repay to L. Moses £500 with interest at the rate aforesaid

on the 6th day of September, 1907, L. Moses will reconvey the said land to A. Fitzgerald.

*In witness*, etc.

*Note*, that Fitzgerald covenants to pay the money, and then conveys the land, and there is nothing to show that he is entitled to get his land back after the expiration of the six months.

Any student with a knowledge of Roman Law will see that this corresponds to the Roman contract of *Fiducia*, in which the borrower transferred the *property* in his goods to the lender subject to a *fiducia* or trust that they should be re-transferred when the money was repaid.

Even after the six months have expired the borrower is allowed to "redeem" his land on paying the principal money and interest. This right is called an "equity of redemption," and the borrower cannot be deprived of it without an order of the Court.

The equitable rule of course prevails since the Judicature Act, and therefore the consequence of a mortgage deed is that the mortgagee holds the land merely as security for the money lent until he takes proper steps to realize his security.

## SECTION II.

### *Rights of the Mortgagee.*

The mortgagee has five ways in which he can enforce repayment.

I. *Sue on the personal covenant.*—The mortgagor, as we have seen, covenants in the mortgage deed that he will re-pay the money lent with interest, and the mortgagee can sue on this covenant at any time after the six months (*a*) have expired.

This remedy will be used if the land becomes less valuable and insufficient to secure the mortgage debt.

(*a*) Or other period fixed for payment.

It will only be useful if the mortgagor has money with which he can pay, and therefore is not so valuable as the remedies against the land itself.

II. *To take possession.*—At law the mortgagee is entitled to the fee simple, and therefore *he can enter into possession of the land at any time*, after the execution of the mortgage (*b*).

It is usual, however, to leave the mortgagor in possession, and equity discouraged a mortgagee from entering into possession; hence the following rule.

If the mortgagee takes possession, he must account very strictly, not only for the rents and profits of the land which he has received, but also for all those *which he might have received* if he had exercised the greatest care.

*White* v. *City of London Brewery* (1889), 42 Ch. D. 237.

The Brewery Company were mortgagees of a public house. They entered into possession and made a lease of the house to Moulton with a proviso that Moulton should only buy beer from them.

*Held*, the Brewery Company must account not only for the rent which they received from Moulton, but also for the increased rent which they might have received if they had let the public house as a "free house."

An account taken on this basis is called "an account on the footing of wilful default," the mortgagee being liable for all moneys which "but for his wilful default" he might have received.

The mortgagee incurs the same liability if he appoints another person as his agent to take possession and collect the rents and profits.

If the land has been leased by the mortgagor, the mortgagee can give the tenants notice to pay the rent to him.

(*b*) Unless the mortgage contains covenants inconsistent with this right. Coote on Mortgages, 8th ed., Vol. II., p. 821.

III. *To Foreclose.*—The mortgagee can at any time, after the six months (*c*) have expired, apply to the Court that the mortgaged land may become his absolutely, freed from the equity of redemption.

The Court fixes a time (usually six months) within which the mortgagor must pay off the debt, and declares that (i.) if the mortgagor shall pay off the mortgage debt with interest and costs within that time, the mortgagee shall re-convey the land to him. (ii.) If not, the mortgagor shall be *for ever foreclosed of his equity of redemption.*

This is called an order for foreclosure "*nisi*" because the mortgagor will be foreclosed "*unless*" he pays within the six months. Thus the mortgagor is given an opportunity of raising the money elsewhere, and if he fails to do so, a foreclosure order *absolute* will be made and the land thereupon becomes the property of the mortgagee.

The equity of redemption can only be extinguished in this way by an order of the Court.

IV. *To sell.*—The mortgagee may, under certain circumstances, sell the land; if so he must apply the proceeds of sale (after paying off any prior mortgagees)

(1) in paying the costs of sale;

(2) in paying to himself the mortgage debt and interest;

(3) he must pay the surplus to the mortgagor (*d*) or other person entitled to such surplus.

This is not such a harsh remedy as foreclosure, for the mortgagor does not lose his whole interest in the land, but is entitled to the surplus of the proceeds of sale if the land is more valuable than the mortgage debt.

The mortgagee can sell *without an order of the Court.*

(*c*) Or other period fixed for payment.
(*d*) Conveyancing Act, 1881, s. 21 (3).

The circumstances under which he can sell are as follows :—

(1) *If the mortgage was made before* 1860.—He has no power of sale unless such a power was expressly given by the mortgage deed.

(2) *If the mortgage was made after* 1860 *and before* 1882.—A power of sale is implied in every mortgage by deed by Lord Cranworth's Act, 1860 (*e*).

But this Act was not usually relied on, as the power of sale thereby given was not sufficiently wide in some respects.

(3) *If the mortgage was made after* 1881 (*f*) then by s. 19 of the Conveyancing Act, 1881, a power of sale is implied in every mortgage *by deed* as if it were expressly inserted in the deed, unless the deed provides that there shall be no power of sale.

*A mortgagee cannot exercise this power of sale* (*g*) until (1) the principal money is due, *i.e.* the six months have expired ;

*and* (2) either (*a*) he has given *notice* in writing demanding payment and there has been three months' default on the part of the mortgagor ;

or (*b*) some *interest* under the mortgage is *two months in arrear ;*

or (*c*) there has been some breach of the covenants in the mortgage (other than the covenant to pay the money lent and interest).

V. *To appoint a Receiver.*—If the mortgage was made by deed after 1881 (*h*) the mortgagee has an implied power to appoint some person to receive the rents and profits of the land and to apply them in payment of the interest due under the mortgage (*i*).

(*e*) 23 & 24 Vict. c. 145, and see Goodeve, R. P., 391 and 394.
(*f*) *I.e.* after the 31st of December, 1881.
(*g*) S. 20.
(*h*) Lord Cranworth's Act also gave power to appoint a receiver ; but this was too stringent against the mortgagor, and was therefore often modified.
(*i*) S. 19 (1) (iii.).

Mortgage deeds before 1881 usually provided that the mortgagee should have power to nominate some person who should act as the agent of the *borrower* to collect the rents of the land, and, after paying the interest to the mortgagee, pay the rest of the rents to the borrower.

A receiver so appointed is *the agent of the mortgagor*, consequently the mortgagee gets the advantage of having some person whom he can trust to collect the rents and pay the interest, without the liabilities which he would incur if he were to take possession himself or by his own agent.

*A receiver can only be appointed in this way when the power of sale has become exercisable.*

That is to say, the conditions which apply to a power of sale, viz. 3 months' notice, etc., apply also to the appointment of a receiver.

By the same section 19 the mortgagee is given power to insure the mortgaged property, and to add the amount of the premiums to the capital sum secured by the mortgage.

*The mortgagee can exercise all or any of these remedies*, and the fact that he has exercised one does not prevent him from exercising the others so long as he has not been paid in full.

Thus, if he sues on the covenant and recovers judgment, but cannot get paid, he may sell, or apply to the court for foreclosure.

If he sells the land and does not recover sufficient to pay the whole debt, he may sue for the balance.

If he forecloses and does not feel satisfied, he may sue for the whole debt; but if he does this, he gives the mortgagor another chance of redeeming; for if the mortgagor pays the debt and interest, *the foreclosure is "opened up"* and the land must be re-conveyed to him.

*Right to make Leases.*—The mortgagee, if in possession, can make building leases of the land for 99 years, or occupation leases for 21 years. See p. 233.

*Statute of Limitations.*—If a mortgagee enters into possession of the land and remains in possession for 12 years without acknowledging the title of the mortgagor, the equity of redemption is barred, and the mortgagee becomes absolutely entitled to the land.

This is the effect of the Real Property Limitation Act, 1874 (*k*).

Similarly a *mortgagor* who remains in possession for 12 years without paying interest becomes entitled to the land free from the mortgage.

And if no interest is paid on the mortgage debt for 12 years, the right to sue for the debt itself is barred (*l*).

## SECTION III.

### *Rights of the Mortgagor.*

The mortgagor is usually allowed to remain in possession; but he has no *right* to possession, if the mortgagee chooses to enter.

The mortgagor has a power to redeem his land (*m*) at any time on payment of the principal debt and interest; but he must give the mortgagee six months' notice of his intention to redeem, or six months' interest in lieu of notice.

This is to give the mortgagee an opportunity of finding another investment for his money.

The right of the mortgagor to recover his land free from all charges and obligations at any time on payment of the debt and interest can never be destroyed except by (1) foreclosure (see p. 227 above), or by (2) lapse of time (see above).

The maxim is "*once a mortgage, always a mortgage.*"

(*k*) 37 & 38 Vict. c. 57, s. 7, amending 3 & 4 Will. IV. c. 27, s. 28.
(*l*) S. 8.
(*m*) This is called his "equity of redemption."

This maxim is applied in two ways—

(1) Equity will not allow any "clog" on the equity of redemption.

This means that *any provision in the mortgage deed which attempts to deprive the mortgagor of his right to redeem absolutely and at any time* (*n*) *is void.*

Thus, a provision that the mortgagor shall not be allowed to redeem after 6 years would be void.

So also—

*Howard* v. *Harris* (1681), 1 Vern. 33.

Howard mortgaged land. The mortgage deed contained a proviso that the mortgagor and *his heirs male* might redeem. Howard conveyed the land, subject to the mortgage, to an assignee, who was not his heir male.

*Held*, the assignee may redeem.

And a mortgagor who redeems is entitled to get his land back free from all restrictions (*o*).

*Carritt* v. *Bradley*, [1903] A. C. 253.

B, who held most of the shares in a tea company, mortgaged them to C. The mortgage contained a proviso that B as such shareholder would induce the company to employ C as its agent to sell tea, and would pay damages if he was not so employed. The company paid off the mortgage, and ceased to employ C, who claimed damages for breach of the agreement to employ him.

*Held*, the proviso in the mortgage as to the employment of C ceased to exist after the mortgage was paid off.

This rule does not prevent the mortgagee from buying, and thus putting an end to, the equity of redemption; for *the mortgagor can, by a subsequent independent transaction, agree to give up his right to redeem* (*p*).

The law considers that the mortgagor only needs protection when he is borrowing and perhaps pressed for money: when

(*n*) *I.e.* at any time after the mortgage money has become payable.

(*o*) See *G. & C. Kreglinger* v. *New Patagonia Meat Co.*, [1913] W. N. 336.

(*p*) *Lisle* v. *Reeve*, [1902] A. C. 461.

he has once got the money, he can make what bargain he pleases, provided it is really independent and is not part of the loan transaction, and he can even at the time of the loan agree to give some collateral advantage to the mortgagee provided it is not (1) unfair or (2) a penalty clogging his equity of redemption, or (3) otherwise inconsistent with his right to redeem. Consequently such a collateral advantage may continue to be binding even after the loan is repaid.

*G. & C. Kreglinger* v. *New Patagonia Meat Co., Ltd.*, 1914, A. C. p. 25.

August 24th, 1910. A firm of woolbrokers agreed to lend to a meat preserving company £10,000. The loan was not to be called in until September 30th, 1915, but the company might pay off at any time on giving one month's notice. The loan was secured by a floating charge on the undertaking of the company. The agreement provided that for a period of five years the company should not sell sheep skins to any person other than the lenders so long as the latter were willing to buy at the best price offered by any other person, and that the company should pay to the lenders a commission on all sheep skins sold by the company to any other person. In January, 1913, the company paid off the loan, and the lenders claimed to exercise their option of pre-emption notwithstanding the payment off of the loan.

*Held*, that the stipulation for the option of pre-emption formed no part of the mortgage transaction, but was a collateral contract entered into as a condition of the company obtaining the loan; that it was not a clog on the equity of redemption or repugnant to the right to redeem.

It is important to note the difference between this case and *Carritt* v. *Bradley* (see p. 231). In the latter case the *shares* remained tied by a restriction which prevented free dealings with them. In the former case the company remains free to deal with its *property* in any way it liked.

(2) If a transaction is really a mortgage, though it is carried out in the form of a sale, equity will treat it as a mortgage, and will not allow the mortgagor to be deprived of his equity of redemption.

Thus, A sells his land to B for £1000, and A reserves an option to buy back the land within a year for £1050. This may be

practically a mortgage of the land for £1000 at 5 per cent., with an attempt to deprive A of his land if he does not exercise the option by paying the money within the year.

If so, the Court will treat it as a mortgage, and allow A to redeem his land, even after the year, on payment of the mortgage debt with interest at 5 per cent.

Example.

*Marquess of Northampton* v. *Pollock* (1890), 45 Ch. D. 190.

C was entitled to certain property if he should survive W.

C insured his life for £34,500, to be paid if he died *before* W. He then mortgaged his contingent interest in the property and the policy of life insurance to the insurance society for £10,000. The mortgage contained a proviso that if the £34,500 should become payable, it should belong to the society absolutely.

*Held*, this proviso was void.

*Statute of Limitations.*—If the mortgagor remains in possession of the land for 12 years without paying any part of the principal or interest, the right of the mortgagee is barred. See p. 230, *ante*.

*Power to Lease Mortgaged Land.*—Whichever of the parties to a mortgage is in possession of the land has power to make leases.

*By the Conveyancing Act*, 1881, s. 18.—If the mortgage was made after the Act, either a mortgagor or a mortgagee, if in possession of the land, can make valid leases for the following periods :—

(1) Agricultural or occupation leases 21 years.

(2) Building leases 99 years.

*Note*, that these are the same terms as are allowed to a tenant for life under the Settled Land Act, except that *a mortgagor or mortgagee cannot make mining leases.*

If the mortgage was made before 1881 neither the mortgagee nor the mortgagor has any power of leasing except by express agreement.

## SECTION IV.

### *Death of the Mortgagor.*

The equity of redemption of a mortgagor is *an equitable estate* in the land (*q*). It is real property, and descends to the heir of the mortgagor if he dies intestate.

*The Heir takes the Land subject to the Mortgage Debt.*—This is the result of *Locke King's Act*, 1854 (*r*).

Before the Act the heir took the land; but the mortgage debt, like any other debt, was payable out of the personal property.

Since the Act, if the mortgagor devises the land by will, the devisee takes it subject to the mortgage debt, and if he dies intestate the heir takes it in the same way.

## SECTION V.

### *Death of the Mortgagee.*

(A) *On the Death of a Sole Mortgagee.*—The estate of a mortgagee is personal property even if he has the legal estate in fee simple vested in him, and *on the death of a sole mortgagee after* 1881, *his estate vests in his personal representatives.*

*If the Mortgagee died before* 1881.—The legal estate being a fee simple passed to the heir or devisee of the mortgagee.

But the benefit of the money secured by the mortgage went to his personal representatives. Therefore, if the mortgagor wished to redeem after the death of the mortgagee, he had to pay the money to the personal representatives and get a receipt

(*q*) *Casborne* v. *Scarfe* (1737), 1 Atk. 603. Where it was held that a husband is entitled to curtesy of lands which his wife holds subject to a mortgage.

(*r*) 17 & 18 Vict. c. 113, amended by 30 & 31 Vict. c. 69, and 40 & 41 Vict. c. 34, by which the statute was extended to equitable charges and liens.

from them, and the heir had to re-convey the land. This was very inconvenient.

Now by s. 30 of the Conveyancing Act, 1881, on the death of a sole mortgagee after the Act the estate vests in his personal representatives "*notwithstanding any testamentary disposition*," and they have power to reconvey it.

Hence, even if the mortgagee in his will devises his mortgages to A, and appoints B his executor, the legal estate passes to B.

(B) *On the Death of one of several Mortgagees.*—When land is mortgaged to more than one person, the land is usually granted to them as *joint tenants*. In this case, on the death of one the *legal estate and the benefit of the money secured both pass to the surviving mortgagees.*

*History of the Rule.*

(*a*) *The Legal Estate.*—This always passed to the survivor.

(*b*) *The Benefit of the Money secured.*

*If the mortgage was made before* 1881, this passed to the personal representatives of the deceased mortgagee and did not go to the survivors.

Equity presumed that when two or more persons joined in lending money, they did not wish the whole to go to the one who lived longest; consequently, in equity, *a share of the benefit of the money secured went to the representatives of each mortgagee who died.*

As a matter of fact, when money is advanced by several persons in this way, they are almost always trustees, and it is therefore more convenient that the benefit of the money should pass to the survivors. This led to an alteration of the rule.

*If the Mortgage was made after* 1881.—*By the Conveyancing Act*, 1881, s. 61, when money has been advanced by several mortgagees and the land has been conveyed to them as joint tenants, on the death of any one of them the benefit of the mortgage debt

passes to the survivors unless a contrary intention appears in the mortgage deed.

Before the Act, this result was usually secured by an express clause to that effect, called a "joint account clause." Such a clause is now unnecessary; but it is usual to state expressly that the money was advanced on a joint account.

*In case of a Contributory Mortgage.*—When several persons contribute to advance a sum of money, but not as joint tenants, each being entitled to a specific share of the mortgage debt, then on the death of any one, his share passes to his personal representatives.

This is a very unsatisfactory way of advancing money, so much so that trustees are not allowed to advance money on contributory mortgage.

## SECTION VI.

### *Transfer of Rights.*

*Transfer by Mortgagor.*—A mortgagor can transfer his equity of redemption to another.

If so, he conveys the land to the transferee in fee simple, subject to the mortgage debt.

He cannot, however, get rid of his liability to pay the debt under the covenant in the mortgage, except by consent of the mortgagee.

Hence, the transferee of the equity of redemption should covenant to pay the debt and indemnify the original mortgagor.

*Transfer by Mortgagee.*—A mortgagee can transfer his mortgage by conveying the legal estate to the transferee and assigning to him the benefit of the mortgage debt.

Notice of the transfer is given to the mortgagor, and he is then bound to pay the debt and interest to the transferee, but subject to the following rules.

(1) If the mortgagor pays the debt or interest to the transferor before he has notice of the transfer,

the payment is good, and he cannot be called upon to pay again. This is obviously only fair to the mortgagor.

(2) The transferee takes the mortgage "*subject to the state of accounts*"—

*I.e.* he gets the benefit only of so much of the debt as has not been paid off: and if the debt has in fact been paid, the transferee gets nothing.

Hence it is rarely safe to take a transfer of a mortgage without the mortgagor being a party to the deed. It will then be clear that he had notice of the transfer, and the deed will state how much is still owing.

## SECTION VII.

### *Submortgages.*

A mortgagee can mortgage his mortgage to another.

Thus, in the form on p. 224, Fitzgerald mortgaged land to Moses for £500, and conveyed the land to Moses, subject to a proviso for redemption. Moses now wishes to borrow £300 from C. Moses therefore conveys the land (subject to the proviso for redemption), and transfers the mortgage debt to C subject to a new proviso by which Moses is enabled to redeem his mortgage on paying the £300 to C.

Thus a submortgage is a transfer of a mortgage to secure money lent to the mortgagee.

## SECTION VIII.

### *Equitable Mortgages.*

Money can be secured on land without conveying the legal estate to the lender. This does not give the lender any rights against the land at law; but in equity he has always had a charge on the land. Equitable mortgages are created in three ways.

(1) *By Deposit of Title Deeds.*

A borrows money from his bank and deposits the title deeds of his land with the bank as security. A cannot get his deeds from the bank except by bringing an action in equity claiming specific delivery. It is a maxim of equity that "he who seeks equity must do equity," and therefore equity would not allow A to get back the deeds unless he paid the money to the bank.

Sometimes the mortgagor signs a memorandum promising to give a legal mortgage when called upon.

A deposit of title deeds gives an equitable estate to the mortgagee, because equity "treats as done that which ought to be done" and treats the mortgagee almost in the same way as if the land had been conveyed to him.

(2) *By a Charge.*—A tenant of land may, by deed or writing, or by will, or sometimes by mere conduct, create a charge on his land without conveying the land to the mortgagee. This creates merely an equitable charge.

(3) *By a Second Mortgage.*—When a mortgagor has made a legal mortgage of his land, the legal estate has passed to the mortgagee, and the mortgagor has only an equity of redemption. If, therefore, the mortgagor mortgages the same land again to a second mortgagee, and conveys his interest in the land to him, the *second mortgagee has only an equitable estate in the land.*

An equitable mortgagee has a power to sell and to appoint a receiver if the mortgage was made by deed; he can also foreclose (subject to the rights of any prior mortgagees), but he has no right to take possession of the mortgaged land.

## SECTION IX.

### *Priorities.*

(1) *As between Equitable Mortgagees.*—If a tenant of land creates several equitable charges on his land, the mortgagee who obtained his charge first has a right to

be paid first. The maxim "*Qui prior est tempore potior est jure*" applies.

Thus A in 1890 charges his land by an instrument in writing with the payment to B of £500. In 1895 A deposits the title deeds of the land with his bank to secure an overdraft. B has a right to be paid his £500 before the bank gets anything (*s*).

*Grierson* v. *National Provincial Bank*, [1913] 2 Ch. p. 18.

The owner of leasehold premises charged them with the payment of certain moneys to the G and M Bank, and deposited the lease as security. He then mortgaged the premises by sub-demise expressly subject to the bank's charge. The legal mortgagee did not give the bank notice of his mortgage. The mortgagor subsequently, without the knowledge of the legal mortgagee, paid off the G and M Bank, obtained the lease from them, and deposited it with the defendant bank, who had no knowledge of the legal mortgage, to secure moneys advanced by them. In an action by the executors of the legal mortgagee to establish their priority over the defendant bank—

*Held*, that the legal mortgagee had not been guilty of any misconduct, negligence, or want of caution for which he could be held directly or indirectly responsible; and that nothing had happened to take away or affect his original priority.

(2) *As between a Legal Mortgage and an Equitable Mortgage.*—This case is governed by the further maxim, "Where the equities are equal, the law prevails."

This means that when two or more persons have advanced money to the same mortgagor without knowing that the mortgagor has made or is making other mortgages, then, if one of the lenders has taken the precaution of acquiring the legal estate in the land, he will be paid first, although his mortgage was later in point of time.

The rule is that as between several mortgagees of the same land, the *mortgagee who has the legal estate has priority*, provided that *when he lent his money* he had no notice of the other mortgages.

(*s*) Unless B was negligent in allowing A to retain the deeds.

This gives rise to a curious doctrine called "Tacking."

*Tacking.—The priority given to the mortgagee who has the legal estate extends,* not only to the money originally advanced on the legal mortgage, but also *to all other moneys advanced by the same mortgagee afterwards, provided he does not know of the other mortgages when he makes the further advances.*

Thus, Fitzgerald, as in the form on p. 224, mortgaged his land worth £800 to Moses for £500, and conveyed the legal estate to Moses on the 6th of March, 1907.

In June, 1907, Fitzgerald mortgaged the same land to his aunt for £200.

In October, 1907, Fitzgerald fraudulently mortgaged the same land again to Moses for a further £200, Moses having no notice of the mortgage to the aunt. Fitzgerald has become bankrupt and the land is not sufficient to pay off all the mortgages.

Both Moses and the aunt are innocent persons who have been defrauded by Fitzgerald, consequently each has an equal equity to be repaid out of the land; but as Moses has the legal estate, he can claim to be paid the whole of his £500 and his £200 with interest and costs, before the aunt gets anything. Moses is said to "Tack" his last mortgage on to his first mortgage.

*A legal mortgagee has no right to tack any advances which he makes after having notice of the other incumbrances.*

Thus, if in October, 1907, Moses had known that the aunt had advanced a further £200 on the land, he must bear the consequences of his own folly in trusting Fitzgerald to such an extent.

If a person who has advanced money on an equitable mortgage afterwards discovers that there are several other mortgages on the same land, he should immediately try to get the legal estate. For the *rule as to tacking* applies not only to a first mortgagee, but *extends to any mortgagee who gets the legal estate,* even though he gets the legal estate after he knows of the other mortgages, *provided he had no notice* of them *when he lent his money.*

Thus, if after the mortgage to his aunt, Fitzgerald had borrowed another £200 from his bank on the security of an equitable charge on the land, and the bank did not know of the mortgage to the aunt when they lent the money. As soon as the bank hear of the mortgage to the aunt they will probably buy in the first mortgage from Moses for £500 and his interest and costs, and will then *tack* their £200 charge to Moses' first mortgage and thus practically destroy the aunt's charge (*t*).

Note especially that the point of time when notice is material is the time when the money was advanced on mortgage.

A mortgagee cannot take advantage of this rule if (when he lent his money) he had *constructive notice* of a prior equitable mortgage. That is, if he did not actually know of it, but would have known if he had taken all proper precautions.

## SECTION X.

### *Consolidation.*

When two or more pieces of land are mortgaged for separate amounts by separate mortgages, the borrower is now entitled to redeem each mortgage separately, unless

(1) both pieces of land belong to the same borrower, and are held in mortgage by the same mortgagee, *and*

(2) one at least of the mortgages was made before the 31st of December, 1881, *or* contained a clause allowing the mortgagee to "*consolidate.*"

*History of the Rule.*

*At Common Law.*—If the same borrower mortgaged two or more pieces of land to the same mortgagee, the mortgagee could "consolidate" the mortgages and treat them as one mortgage for all the advances together.

Thus, Fitzgerald mortgaged a freehold house, called "Woodside" (worth £1000), to Moses for £500 (as in the form on p. 224).

(*t*) See *Brace* v. *Duchess of Marlborough* (1728), 2 P. W. 490.

Later, Fitzgerald mortgaged a brickfield to Moses for £1000. The brickfield became depreciated and is now worth only £500. Fitzgerald would be glad to clear off the £500 from "Woodside," but he would not be so anxious to pay off the £1000 from the brickfield. On the other hand, Moses would be very anxious to get the £1000 paid off as the security is insufficient; but he would not necessarily wish to have the £500 paid off. *The rule* was that if Fitzgerald claimed to pay off the £500 and redeem "Woodside," Moses could refuse to allow him to do so, unless he also paid off the £1000 on the brickfield. Fitzgerald was claiming to exercise a purely equitable right, and the maxim of equity was "he who seeks equity must do equity." Consequently Moses could *consolidate* the two mortgages and treat them as one mortgage for £1500 on both the properties.

*By the Conveyancing Act*, 1881, *s.* 17, when a mortgage is made after 1881, the mortgagee has no power of consolidation *unless such a power is expressly given in the mortgage deeds or one of them.*

A clause expressly allowing consolidation is now frequently inserted in mortgage deeds; consequently the common law on this subject is still most important.

If either of the mortgages excludes s. 17 of the Conveyancing Act, the old law applies.

*Further rules when consolidation is allowed.*—Consolidation may apply where the mortgages were made by the same (*u*) mortgagor to different mortgagees, if at any time while the equity of redemption in all the mortgages is vested in the same person the mortgages all become vested in the same mortgagee.

*Pledge* v. *White*, [1896] A. C. 187.

In 1863 James Banks mortgaged 5 Shakespeare Terrace and one other property to John Banks for £500 each. In 1865 James Banks mortgaged one other property to Hobday and four other properties to other mortgagees.

(*u*) But not if made by different mortgagors. *Sharp* v. *Rickards*, [1909] 1 Ch. 109.

Between 1871 and 1873 all the mortgages except one were transferred to Brockman.

Brockman died in 1877, and in 1890 the remaining mortgage was transferred to Brockman's executors, who thus became mortgagees of all seven properties. Pledge (who had acquired the equity of redemption of all the properties from James Banks) claimed that he was entitled to redeem 5 Shakespeare Terrace by paying off the £500 secured on that property only.

*Held*, Brockman's executors can claim to have all the mortgages paid off.

The difference between tacking and consolidation is as follows :—

In the case of tacking, one piece of land is mortgaged by the same person to *different* mortgagees.

In the case of consolidation, *several* pieces of land are mortgaged by the same person to the *same* mortgagee.

*Consolidation as against other mortgagees.*

When the borrower has mortgaged one of the pieces of land several times to different mortgagees, and makes a mortgage of another piece of land to one of the same mortgagees, the position becomes rather complicated ; the rule is then as follows :—

When a mortgagee obtains a right of consolidation, any persons who afterwards take mortgages of either piece of land, take subject to his right of consolidation.

But any persons who took second mortgages before the first mortgagee obtained his right to consolidate cannot be prejudiced by the consolidation.

*Hughes* v. *Britannia Building Society*, [1906] 2 Ch. 607.

In 1894 Worley mortgaged No. 11 Manchester Avenue to the Society for £87.

In 1895 Worley mortgaged "Rocklea" to the Society for £900.

The next day Worley mortgaged "Rocklea" to Hughes for £7000.

In 1897 Worley mortgaged No. 9, Manchester Avenue to the Society for £687.

In 1905 "Rocklea" was sold.

The Society claimed that after payment to them of the £900 due on the mortgage of "Rocklea," they were entitled to claim that the mortgages for £87 on No. 11 and for £687 on No. 9 should all be paid before Hughes got anything.

*Held*, the Society are entitled to consolidate the mortgage on No. 11 as it was made before the mortgage to Hughes.

But they are not entitled to consolidate the mortgage on No. 9 as it was made after the mortgage to Hughes.

Therefore the Society could claim £987 out of the purchase money, and the rest must go towards paying the £7000 to Hughes.

## SECTION XI.

### *Mortgage of Leaseholds.*

A lessee of land who pays rent which is less than the full annual value of the land has a valuable estate in the land, and he can borrow money by mortgage of his interest.

*A mortgage of leaseholds is usually made by a sub-lease and not by assignment.*

The reason of this is that (as we have seen on p. 204) an assignee of a lease is bound to perform the covenants in the lease; if therefore the mortgagor were to assign the whole of his term to the mortgagee, the mortgagee would be bound to perform the covenants in the lease.

The mortgagor therefore usually sub-lets the whole of his term *except the last few days*.

The mortgagee is then only a sub-lessee, and is not liable on the covenants to the original lessor.

The mortgagor usually declares himself to be a trustee of the last few days of the term for the mortgagee.

In either case the mortgage will contain a proviso that the mortgagee shall re-assign his term to the mortgagor if the money lent is repaid within 6 months with interest.

The student should read the form of a mortgage of leaseholds on p. 328.

## SECTION XII.

### *Mortgage of Copyholds.*

The mortgagor surrenders his estate to the use of the mortgagee, or covenants that he will surrender it to him; but the mortgagee is not usually admitted, unless he wishes to foreclose.

The reason for this course is that fines are payable to the lord of the manor on every admittance, and these are therefore avoided if the mortgagee is content with a surrender.

If the money is paid off, he can re-surrender the land to the mortgagor, and no fine is payable at all (*x*).

If the mortgagee forecloses, he is then admitted, and the admittance dates back to the surrender, *i.e.* he is treated as having been the legal tenant since the date of the surrender.

The surrender is usually preceded by a covenant to surrender, containing the terms upon which the money is lent, the date of re-payment, rate of interest, etc. These clauses are very similar to the corresponding clauses in a mortgage of freeholds.

The student should read the form of a mortgage of copyholds on p. 327.

(*x*) Unless there is a special custom to the contrary.

# CHAPTER XXX.

## LIMITATION.

If a person allows a stranger to remain in possession of his land for 12 years without payment of rent, and not under a lease, the stranger becomes entitled to the land.

This is the joint effect of the Real Property Limitation Acts, 1833 (*a*) and 1874 (*b*). The earlier Act fixed the period at 20 years, and the latter reduced it to 12. The result is as follows :—

*No action for the recovery of land can be brought, except within* 12 *years after the right of action first accrued* (sect. 1 of the Act of 1874).

See the full text of this section on p. 310.

Thus, if A is the true owner and leaves his land vacant in 1890, and B takes possession of the land in 1895, A's right of action against B "accrues" in 1895, so that his right will be barred in 1907.

If B continues in possession till 1907, B becomes entitled to the land.

Not only is the right of action barred, but the *title of the original owner is destroyed* (*c*).

Thus, the rule differs from the case of personalty, for if B retains possession of A's chattel for 6 years, A's right of action only is barred, and the chattel remains his property and he can recover it by any peaceable means.

The wrongful possessor acquires the title of the original owner, subject to all the restrictions and

(*a*) 3 & 4 Will. IV. c. 27. (*b*) 37 & 38 Vict. c. 57.
(*c*) Act of 1833, s. 34.

incumbrances which were attached to the land in his hands, unless they have also become barred by non-payment of interest (*d*) or other means.

*Re Nisbet and Potts' Contract*, [1906] 1 Ch. 386.

In 1867, Kidd covenanted not to build shops on a certain piece of land, of which he was tenant in fee simple. Some time before 1877 Headde took possession of this land, and in 1890 he sold it to Nisbet. In 1903 Nisbet agreed to sell the land to Potts. Potts discovered the existence of the covenant, and refused to complete his purchase. Nisbet contended that Potts would not be bound by the covenant, as the rights of all persons were barred by Headde's possession for more than 12 years.

*Held*, Headde acquired the land subject to the covenant, and as the covenant had never been broken, no right of action had accrued, and the Statute of Limitations had not commenced to run. Therefore Potts would be bound by the covenant; and he could refuse to complete his purchase.

Any person who takes possession has a right to keep that possession against any one but the true owner, even though he has not been in possession for 12 years.

The following case occurred before 1874 while the period required was 20 years.

*Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1.

Thomas Williamson enclosed a piece of waste land in 1842, and in 1850 he enclosed more land and built a cottage. He died in 1860, and devised his cottage and garden to his widow for life, with remainder to his daughter. The widow married Whitlock, and both she and the daughter died in 1863. Whitlock remained in possession of the land until 1865, when it was claimed by the daughter's heir.

*Held*, although T. Williamson had not been in possession for so long as 20 years, yet he had a better right to the land than any one except the true owner. And he had devised this right to the daughter: therefore her heir was entitled to the land.

(*d*) See p. 230.

If a wrongful possessor gives up possession before he has been in for 12 years, and the land becomes vacant, the rights of the true owner revive, as there is then no one whom he could sue.

*Trustees, etc., Agency Co.* v. *Short* (1888), 13 A. C. 793.

The plaintiff company owned some open bush land in Botany Bay, New South Wales, to which the Act of 1833 applied.

In 1848 Meredith took possession of the land: but he abandoned it in 1853. The land remained vacant for several years. Some years after 1866 Short took possession. The company claimed the land in 1886.

*Held*, as Meredith was not in possession for 20 years, the company's rights revived in 1853, as there was no person whom they could have sued after that date. And their right of action first accrued again when Short took possession, and as he had not been in possession for 20 years, the land still belonged to the company (*e*).

*Disabilities.*—If at the time *when the right of action first accrued* the true owner was under disability (such as infancy or lunacy), he has 6 *years from the time when the disability ceased or* (like any other owner) 12 *years from the time when his right of action first accrued*, whichever shall be the longer, but not more than 30 years (*f*).

Thus A, the true owner, was born in 1870; B took possession of his land in 1880 (*i.e.* A was aged 10 when the right of action first accrued); A became a lunatic when he was 20 years old A would not be barred until 6 years after he ceased to be a lunatic. But in any case he would be barred in 1910.

If the true owner was not under disability when the right of action *first* accrued, the time will continue to run, although he afterwards falls under a disability.

(*e*) If Short had taken possession by turning out Meredith in 1853, the company would have been barred in 1868, but probably Meredith could have sued Short for the land at any time before 1873.

(*f*) Act of 1874, ss. 3 and 5.

*Garner* v. *Wingrove*, [1905] 2 Ch. 233.

In 1883 Meek allowed Wingrove to take possession of certain land in West Ham. In 1891 Meek's trustees sold the land to G, and G thus acquired a right of action against Wingrove. G died in 1892, and devised the land in trust for his sons, who were then *infants*. In 1902 the elder son became of age, and in 1905 the sons sued W for the land.

*Held*, when the right of action first accrued to Meek in 1884 (*g*), and when it first accrued to G in 1891, there was no disability. Therefore the time continued to run in spite of the infancy of G's sons, and they were barred.

At one time absence beyond seas was a disability, but since 1874 (*h*) this is not considered as a disability in the case of the plaintiff; but if the defendant is abroad it may prevent the time from running in his favour in respect of an action for trespass (*i*).

In case of a lease for years, (1) Non-payment of rent by the tenant for however long does not bar the landlord. The time begins to run from the end of the term (*Doe* d. *Davy* v. *Oxenham* (1840), 7 M. & W. 131); (2) Payment of rent to some person other than the landlord for 12 years bars the landlord if the rent amounts to £1, but the landlord is not barred if the rent is less than £1. (3 & 4 Will. IV. c. 27, s. 9.)

*A remainderman* has the following periods within which he must sue (*k*) :—

(1) If the tenant of the particular estate was in possession when the particular estate ceased, the remainderman has 12 years from the time when he became entitled to possession.

(2) If the tenant of the particular estate was not in possession, then the remainderman has 6 years from the time when he became entitled to possession (or 12 years from the time when the right of action first accrued to the tenant of the particular estate).

(*g*) The right of action is held to accrue in case of a tenancy at will, one year after the tenant takes possession. 3 & 4 Will. IV. c. 27, s 7.
(*h*) S. 4.
(*i*) 4 & 5 Anne, c. 3, s. 19. Darby and Bosanquet, 2nd ed., p. 55.
(*k*) Act of 1874, s. 2.

Thus, land is granted to X for life, remainder to A in fee simple.

(i.) If C takes possession of the land on the death of X, A has 12 years in which to sue.

(ii.) If C took possession of the land more than 6 years before the death of X, and turned X out, then A has only 6 years from the death of X.

*White* v. *Summers*, [1908] 2 Ch. 256.

W. B., who died in 1847, devised land to J. Bowen for life, remainder to the first son of James Summers who should attain 21, remainder to Mrs. White for life, remainder to her first son in tail.

J. Bowen died in 1859; the eldest son of James Summers was then aged 11, so that the contingent remainder in his favour failed; but he took possession, and he and his son after him remained in possession until 1907. Mrs. White died in 1906, and her eldest son then became entitled to possession. In 1907 he claimed the land.

*Held*, the remainder to the son of James Summers was void, and Mrs. White's son had 6 years from 1906 in which he could sue, and he was therefore entitled to the land.

*Enlargement of a base fee.*—If the tenant of a base fee remains in possession for 12 years after the time when the person who created the base fee could have barred the whole entail without the consent of any other person, the base fee is enlarged into a fee simple (*l*).

Thus, land was granted to A for life, remainder to his son in tail, remainder to C in fee simple. In 1880 the son barred the entail without the consent of his father, A (the protector of the settlement), and thus created a base fee. He then sold the base fee to D. A died in 1890, and his son could then have barred the whole entail. If D remained in possession until 1902 (*i.e.* 12 years from 1890) C's rights would be barred.

This rule applies even if the tenant in tail and his issue continue to live during the whole of the 12 years, so that the remainderman has no opportunity

(*l*) Act of 1874, s. 6.

of suing. For he has no right to the land until the death of the person who created the base fee and the failure of his issue.

Thus, if the son of A had died without issue in 1900, C would have become immediately entitled to the land. He would then have 2 years within which to sue D.

*Concealed Fraud.*—If the person who took possession of the land of another did so by fraudulently concealing the true owner's rights, the statute does not run against the true owner.

This defence to the Statute of Limitations is very hard to prove; for it must be shown that—

(1) There was some active fraud (not mere silence) in concealing the true owner's rights. And

(2) the fraud must have enabled the wrongful possession to be taken *at the beginning*, and must have continued until a time within 12 years before the action is brought.

# CHAPTER XXXI.

## PRESCRIPTION.

THE difference between limitation and prescription lies in this : *Limitation applies to a claim to possession of the land itself.*

*Prescription applies to a claim to some right over land* in the possession of another, such as an easement or a profit.

Prescription is founded on the rule that if a person and his predecessors have used a certain right from time immemorial (which is fixed at the first year of Richard I., 1189), his right becomes absolute (*a*).

Prescription is of two kinds—

(1) Prescription *in gross*, where a man claims that he and his ancestors have used a certain right.

(2) Prescription "*in a que estate*" (or prescription of a right appurtenant), where a man claims that he and all those who have held a particular piece of land before him have used the right.

In both these cases if the person claiming the right can prove that he has used the right for 20 years, he thereby raises a presumption that he has used it from time immemorial.

The owner of the land can defeat this claim in several ways, but his right to do so has been somewhat restricted by statute.

The history of the present rule is as follows :—

*At Common Law* the owner could defeat the

(*a*) It is then presumed that the right was granted to him and the grant has been lost.

claim of a person who had shown 20 years' user by showing—

(i.) That there was a time, within legal memory, when the right did not exist.

*E.g.* A claims a right of way between two fields across the land of B, and shows that he has used it for more than 20 years. If B can prove that (say) 100 years ago there was a deep river or pond on the land across which the right is claimed, A's claim is rebutted.

(ii.) By showing that the right was used by the verbal permission of the owner, or under an agreement for a limited time, or other similar arrangements, or

(iii.) By showing that the right was used under a written grant, which has now ceased or can be revoked.

This is still the law as to prescription *in gross*, but in case of prescription *in a que estate* the common law rules are now modified and restricted by the *Prescription Act*, 1832 (*b*), as follows :—

I. In case of *profits à prendre* (*c*)—

(*a*) When the right has been enjoyed for 30 years by a person claiming a right to enjoy it, the claim cannot be rebutted simply by showing that there was a time within legal memory when the right did not exist.

(*b*) When the right has been enjoyed in the same way for 60 years, the claim becomes absolute, and can only be rebutted by showing a *written grant* (*d*).

That is, after the 30 years, one of the Common-law methods of disproving the right is taken away.

After the 60 years, there is only one way left.

Thus, if A claims a right to quarry for stone on B's land ;

A proves that he has exercised the right for 20 years ;

(*b*) 2 & 3 Will. IV. c. 71.

(*c*) See p. 179. (*d*) S. 1.

B can rebut his claim by showing (as in (i.)) that no stone was quarried 100 years ago, or by any other means such as (ii.) and (iii.).

A then goes on and proves user for 30 years;

B can rebut his claim by showing that he was acting under a verbal permission, or any other similar means, as in (ii.) or (iii.), but not as in (i.).

A then proves that he has used the quarry for more than 60 years. B cannot now disprove the claim, unless he can produce a written grant (as in (iii.)).

II. In case of *Easements* (*e*), the rule is the same, but the periods are 20 years and 40 years.

Enjoyment by a person who claims a right to enjoy is sometimes called "*User as of right*," which means, peaceable, open use, as if claiming a right to use, and not merely by permission of the owner (*nec vi, nec clam, nec precario*).

III. In case of *Light* (*f*), mere *user* (*i.e.* not necessarily "as of right") uninterrupted for 20 years gives an absolute right to light, unless it was enjoyed by consent *in writing*.

No interruption will stop the acquisition of the right unless it is submitted to or acquiesced in by the person interrupted for one year after he has received notice of the interruption.

Thus, if A has had a window in his house overlooking B's land for 19 years and 1 day, he cannot be prevented by mere obstruction from acquiring a right to light.

But the 20 years' user must be "*next before action brought*." This will be explained by the case of *Hyman* v. *Van den Bergh*, [1908] 1 Ch. 167.

In 1896 Hyman had windows in a cowshed which had overlooked V. B.'s land for more than 19 years. In 1896 V. B. began to obstruct the lights, and Hyman *agreed to pay him 1s. a year* for the use of the lights.

(*e*) S. 2. (*f*) S. 3.

The 1*s.* was never paid.

In 1907 V. B. again obstructed the lights, and Hyman brought an action to restrain him.

*Held*, for some time after 1896 the user had been by consent in writing. Therefore Hyman had not enjoyed the right uninterruptedly for the 20 years next preceding the action, and had no right to light.

The amount of light which a person becomes entitled to, after user for 20 years, is so much of the light which he has enjoyed during that time as is reasonably required for ordinary purposes. That is to say, he cannot object to any obstruction of the light *unless it amounts to a nuisance* (*g*).

If the building which has enjoyed the light is pulled down and re-built, the new building is entitled to enjoy exactly the same cones of light. But it must be proved that the new windows receive part of the same cone of light as was received by some part of the old windows (*h*).

### *Disabilities.*

If the owner of land is under a disability, the periods of 20 years and 30 years do not run until the disability ceases.

Nor do they run against a remainderman during the life of a tenant for life (*i*).

But the periods of 40 years and 60 years continue to run notwithstanding any disability of the owner of the land (*k*).

*Exception.*—In the case of a *way or a watercourse* the person entitled to a *reversion* after a lease (for more than 3 years or for a life) has 3 years in which to sue, after the lease terminates, even though the 40 years have expired (*l*).

(*g*) *Home and Colonial Stores* v. *Colls*, [1904] A. C. 179.

(*h*) For the meaning of a "cone" of light, see *Andrews* v. *Waite*, [1907] 2 Ch. 500, and especially the plan on p. 503.

(*i*) S. 7. (*k*) S. 7. (*l*) S. 8.

*Note.*—This only applies to

(i.) ways and watercourses,

(ii.) reversion, *not* remainder (*m*), and

(iii.) the period of 40 years (*not* the period 60 years).

But against a Landlord, since rights of way can only be acquired by user as of right, a claim cannot be made against the Landlord or by different tenants of the same Landlord.

*Kilgour* v. *Gaddes*, [1904] 1 K. B. 457.

In 1850 Sir J. Graham having granted a lease of one house to K, granted a lease of the next-door house to G, for 99 years.

From 1850 to 1902 G used a pump standing on part of the land leased to K.

G claimed a right to use the pump.

*Held*, G could not acquire a right to use the pump by prescription, as all prescription must be in the name of the owner of the fee, and he could not acquire a right against himself.

But there is a difference in the case of a right of Light, as by mere user one tenant can claim against another tenant of the same Landlord (*n*).

*Abandonment.*—These rights when once acquired are not lost by mere non-user, unless they can be shown to have been abandoned. Mere non-user for more than 20 years is some evidence of abandonment, but it is generally necessary to show some positive act of abandonment.

As in *Moore* v. *Rawson* (1824), 3 B. & C. 332.

Moore had a wall with windows more than 20 years old, facing Rawson's land. He pulled down the wall and built a stable with no windows on that side. 14 years later Rawson built on his land close to the stable wall. 3 years after that, Moore opened a window in his stable wall, and sued Rawson for obstructing the light.

*Held*, the right to light had been abandoned.

(*m*) *Laird* v. *Briggs* (1881), 19 Ch. D., p. 22.
(*n*) *Morgan* v. *Fear*, [1907] A. C., p. 425.

# CHAPTER XXXII.

## CONTRACTS FOR THE SALE OF LAND.

A CONTRACT for the sale of land may be a very simple matter; it must be in writing, but otherwise there is no special formality required. So also, the conveyance requires simply a deed executed by the seller. But in practice a sale of land may become a most complicated matter, requiring the greatest care and a sound knowledge of real property law.

A chattel, such as a piece of furniture, is usually sold without any investigation into the right of the seller to deal with it as his own. For the person in possession of a chattel is *primâ facie* the absolute owner of it; if he has parted with his ownership, or mortgaged it, these transactions can be discovered by inspecting the register of bills of sale, and even if he is a thief, the buyer is protected if the sale is in market overt; and *if* the sale is bad, he has his remedy against the seller for damages and can usually obtain a similar chattel elsewhere.

Land, as we have seen, may be in the possession of a person who has merely a yearly tenancy, or a life estate, or he may have mortgaged it or bound the land by restrictive covenants, and if the buyer, after completing his purchase, is turned out of the land, or prevented from using it in the way he wishes, no other piece of land can be exactly the same, and he may have spent large sums on building and improvements.

Thus, a purchaser of land must make careful investigation and demand strict proof from the seller that the land is really his.

## SECTION I.

### *An Open Contract.*

When nothing is said as to the way in which the seller shall prove his title, and the contract for sale merely fixes the price which is to be paid for a certain piece of land, it is said to be *an open contract.*

In such a case the seller must prove his title absolutely, subject only to certain restrictions which have been introduced by the custom of conveyancers or by such statutes as the Vendor and Purchaser Act, 1874, and the Conveyancing Act, 1881.

The seller usually wishes to relieve himself from part of this duty. If so, a formal *contract of sale* is prepared; or if the land is sold by auction, formal *conditions of sale* are prepared. See p. 269.

An open contract is usually made by letters.

Thus, B (the buyer) writes, "I am willing to give you £1000 for your house, No. 10, Green Street." Signed, B.

S (the seller) replies, "I accept your offer of £1000 for my house." Signed, S.

The questions then arise—

(1) Was this contract in proper form?

(2) Was it meant to be a binding contract, or only negotiation, preliminary to a formal contract?

As to (1). *Form.*—The contract must comply with s. 4 of the Statute of Frauds (*a*), which provides—

"No action shall be brought to charge any person upon any contract or sale of lands or any interest in them unless the agreement . . . or some memorandum or note thereof shall be *in writing* and signed by the *party to be charged or his agent.*"

Thus if only one party signs the contract, the other can enforce it, but the party who signs cannot.

(*a*) 29 Car. II. c. 3.

The memorandum must show—

(i.) Who are the parties.

(ii.) The price, or consideration for the contract.

(iii.) The property to be sold.

As to (i.) the names of the parties need not be set out in full, provided they are clearly described.

As to (iii.) the property need not be fully described, provided it can be clearly identified.

*Bleakley* v. *Smith* (1840), 11 Sim. 150.

The memorandum was "J. Bleakley agrees with J. R. Bridges to take *the property in Cable Street* for £248 10*s*."

*Held*, evidence may be given to show that Bridges had five houses in Cable Street, and no other property in that street.

As to (2). If the parties set out all the terms of the contract in the letters and merely state that these terms are to be drawn up in formal shape, there is a complete contract when the accepting letter is posted. But if they intend other terms to be discussed and embodied in a formal contract, there is no binding contract until the formal contract is signed.

*Honeyman* v. *Marryat* (1855), 21 Beav. 14.

M's agent wrote, "Mr. Marryat has authorized us to accept the offer made on behalf of your client subject to the *terms* of a contract being *arranged*."

*Held*, this was not complete acceptance of the offer.

But where all the terms are agreed and the parties merely intend that they shall be put into formal shape, there is a binding contract on the letters.

See *Bonnewall* v. *Jenkins* (1876), 8 Ch. D. 70.

The agent of Jenkins (the seller) wrote, "we are instructed to accept your offer of £800, and have asked Jenkins' solicitor to prepare a contract."

*Held*, the letter completed the contract.

When the contract is signed, the buyer generally

pays a deposit of say 10 per cent. of the price to the seller, or his solicitor.

*Proof of Title.*—The seller must now proceed to prove his title. His chief means of proof will be his title deeds.

The person who has the title deeds has probably not parted with the land, otherwise the person to whom he sold it would have claimed them. But this is by no means conclusive proof of title.

If the seller simply handed over his deeds to the purchaser to be examined, it would be very difficult for the purchaser to trace out the history of the land; consequently the seller is bound to make *an abstract* of his title, setting out shortly the material parts of each deed and each event in the history of the land in the order of date.

The buyer, or his legal adviser, then examines this abstract and compares it with the deeds. If he discovers any defects in the title, or requires anything to be explained or proved, he sends "*requisitions*" to the seller, requiring him to answer certain questions. If the answers are not satisfactory, he sends *further requisitions*, until finally either

(1) all difficulties are disposed of: then the purchaser prepares a form of *conveyance* which the seller executes: or

(2) the title is shown to be defective: then the buyer declines to complete the sale; or

(3) the parties differ as to whether a good title is shown or not; then they apply to the court (usually by originating summons under the Vendor and Purchaser Act, 1874) to determine who is right.

The title of the action will then be, *e.g.* "In the matter of a contract between — Nisbet and — Potts," or, more shortly, *re* Nisbet and Potts' contract." See this case on p. 247.

If either party wrongfully refuses to complete the contract, the other can sue him for specific performance, or, if the contract falls through because the seller wilfully refuses to sell, the buyer may sue him for damages for breach of contract (*b*).

But if the sale falls through by reason of a defect in the title, the purchaser can only recover his deposit (if any) and the costs he has incurred in investigating the title. He cannot get damages for loss of his bargain.

*Bain* v. *Fothergill* (1874), L. R. 7 H. L. 158.

*Rules as to the Proof of Title under an Open Contract.*

The reader must understand these rules thoroughly before he can appreciate the effect of the provisions usually contained in a formal contract.

The seller must prove that he has (or will have, or can convey or procure to be conveyed) the fee simple in the land free from incumbrances.

He may of course have expressly agreed to sell only a life estate or any less estate, but if so, this must be clearly stated in the contract.

*Rules as to Mode of Proof.*

I. He must deliver an abstract showing all the dealings with and the history of the land for a certain period.

The buyer cannot demand any abstract or copy of any document dated before that period (*c*).

These periods are—

(i.) In case of *freeholds:* he must start with a document at least 40 years old, which (*a*) deals with the whole legal and equitable estate in the land, (*b*) contains a description of the land, and (*c*) does not

(*b*) *Engel* v. *Fitch* (1869), L. R. 4 Q. B. 659.
(*c*) Conveyancing Act, 1881, s. 3 (3).

show any defect or doubt in the title. This is called "*a good root of title.*"

He must then trace the history of the land, giving an abstract of all the documents dealing with the land and all facts which have affected it down to the date of the contract for sale.

(ii.) In case of copyholds which have been enfranchised.

These are now freehold, but they really combine two titles in one, namely, the freehold title of the lord of the manor which he conveyed to the tenant (*d*), and the copyhold title of the tenant.

The buyer cannot claim proof of the title of the lord of the manor (*e*), and therefore, if the enfranchisement was less than 40 years ago, the buyer can claim proof of—

(A) the title to the copyhold from a good root of title at least 40 years old, down to the enfranchisement;

(B) the title to the combined freehold and copyhold, from the deed of enfranchisement down to the contract for sale.

(iii.) In case of *leaseholds*.

*E.g.* land granted to A for 99 years. A builds a house and then assigns the lease to B for £500.

The buyer can always claim the production of the original lease, however old.

He cannot claim any proof of the title of the landlord to grant the lease, however new the lease may be (*f*), and the same rule applies to a sub-lease.

Thus (A) if the lease is more than 40 years old, the buyer can claim the original lease, and then an abstract starting again from a good root of title at least 40 years old.

(B) If the lease is less than 40 years old, he can claim the original lease and proof of all dealings since that date.

(*d*) See p. 188.
(*e*) Conveyancing Act, 1881, s. 3 (2).
(*f*) Vendor and Purchaser Act, 1874, s. 2.

*Example—*

A in 1907 agrees to buy a leasehold house, the lease of which was granted in 1900, he cannot go further back than 1900.

This is very risky as he is deemed to have notice of everything which he would have found out if he had examined the freehold title back to a good root 40 years old. See *Imray* v. *Oakshette*, [1897] 2 Q. B. 218.

(iv.) *In case of Advowsons* (see p. 179) 100 years' title, with a list of the presentations made during that period (*g*).

(v.) *In case of Tithes* (see p. 182) the original grant of the tithe, and the title traced from a good root, at least 40 years old, to the date of the contract for sale (*h*).

II. He must prove that the property described in the deeds is the same as the property which the buyer has agreed to buy.

This is called "proof of identity." It is often very difficult to prove beyond doubt that the property is exactly the same; especially as in old deeds the land is often described as being in the occupation of some person who is now dead, or by reference to field names which have fallen into disuse.

III. He must prove that the land is of the same size and same nature as the description under which it was sold.

If there is some very slight mistake in the description, the contract can be enforced, but the seller must pay back a small part of the purchase money as compensation.

*Calcraft* v. *Roebuck* (1790), 1 Ves. Jun. 221.

The whole property was sold as freehold. A very small piece turned out to be held by the seller as tenant-at-will.

The Court granted specific performance with compensation.

(*g*) Dart, "Vendors and Purchasers," Vol. I., p. 329, 7th ed.
(*h*) *Ibid.*, p. 331.

IV. He must prove that all the documents mentioned in the abstract were properly executed, and that all the events mentioned in the abstract happened.

*Modification.*

(i.) The buyer must accept as true all statements and recitals (*i*) in deeds or documents which are more than 20 years old.

This does not enable the seller to produce a deed more than 20 years old which states that a certain person was then seised in fee simple, for though the buyer must accept that fact as *primâ facie* true, he is still entitled to have the history of the estate proved to him for at least 40 years (*k*).

(ii.) On a sale of leaseholds, if the seller produces the receipt for the last quarter's rent, the buyer must presume that all the covenants in the lease have been observed.

V. He must produce all the documents set out in the abstract for the purpose of comparison with the abstract, and he must produce all evidence necessary to show that all material events mentioned in the abstract happened.

*Modification.*—If the documents or the evidence of fact are *not in his possession*, he must still produce them, but the buyer must pay the cost of searching for them and producing them for the purpose of his investigation of title (*l*).

This is one of the few cases where the provisions of an open contract are unduly severe to the buyer.

(*i*) See p. 278.

(*k*) *Bolton* v. *London School Board* (1878), 7 Ch. D. 766, has always been treated by conveyancers as wrongly decided, and has now been dissented from. See *Re Wallis and Grout's Contract*, [1906] 2 Ch. 206.

(*l*) Conveyancing Act, 1881, s. 3 (6). The cost of producing documents for the purpose of handing them over on completion must be borne by the seller. *Re Duthy and Jesson's Contract*, [1898] 1 Ch. 419.

*Re Stuart and Olivant's Contract*, [1896] 2 Ch. 328.

The seller agreed that the title should commence with an underlease dated the 13th October, 1865. For the purpose of proving his title he furnished a *copy* of this underlease to the buyer, and said he did not know where the original was, but would search for it *at the buyer's expense*.

*Held*, the seller need not search for the underlease unless the buyer undertakes to pay the cost of the search.

VI. He must show that all the documents have been properly stamped, and, if not, must get them stamped.

A document which is not properly stamped cannot be put in evidence in any proceeding, and is therefore practically useless as a proof of title.

VII. He must execute a conveyance of the land to the buyer, which must be sufficient to convey the whole legal and equitable estate in fee simple (*m*) to the buyer, and must contain (or imply) full covenants for title (as to which see p. 283). If he cannot do this himself, he must, at his own expense, get any persons who have any estate in or charge over the land to join in the conveyance.

Thus if the legal estate is vested in some trustee, or mortgagee who has been paid off, the trustee or mortgagee must convey the legal estate to the purchaser. This is termed "getting in an outstanding legal estate."

VIII. He must, on completion, hand over the title deeds to the buyer.

*Modification.*—He need not hand over—

(1) Title deeds which relate also to any part of an estate retained by him.

The most usual case of this is where A, being entitled to 100 acres sells, say, 60 acres to B. A can retain the deeds.

This rule applies, however small the part retained may be, and

(*m*) Unless he has contracted to sell some estate less than the fee simple.

even if the deeds are only useful to the seller as proving that some easement or right over the land retained has been destroyed.

*Re Lehman and Walker's Contract*, [1906] 2 Ch. 640.

L owned some fields which were subject to a right of way in favour of the owner of Bedford Lodge. L bought Bedford Lodge, so that the right of way was extinguished (*n*). L agreed to sell Bedford Lodge to Walker.

*Held*, L might retain the title deeds of Bedford Lodge because they proved that the right of way over L's fields had been destroyed.

(2) Title deeds which were retained in a similar way by a former owner, and are therefore not in his possession.

Every seller who retains title deeds in his possession must give to the buyer—

(*a*) An acknowledgment of the buyer's right to have the deeds produced whenever he requires them.

And (*b*) an undertaking to keep the deeds safe.

The acknowledgment and undertaking are binding on every person who gets possession of the deeds from time to time, and any one who becomes entitled to the land at any time gets the benefit of them (*o*).

They can only be given therefore by a person who has possession of the deeds. If the seller cannot give them, the buyer is not entitled to refuse to complete, provided he will have an equitable right to production of the deeds.

IX. He must hold the property (to a certain extent) as trustee for the buyer from the date of the contract until the conveyance is completed, but the rents and profits of the land belong to him in the meanwhile.

(*n*) See p. 179.

(*o*) Conveyancing Act, 1881, s. 9.

From the moment when the conveyance is completed, the rents and profits belong to the buyer. Sometimes they have to be apportioned.

Thus A sells to B land which is let to a tenant at £80 per annum, payable on the usual quarter days. If completion takes place between two quarter days the quarterly rent of £20 is divided between A and B in proportion to the two parts of the quarter, before and after the completion.

If a date is fixed in the contract for completion, then these rights *date from the day fixed*, and not from actual completion.

In case completion is delayed, then, to make up to the seller for not getting his purchase money at the time agreed, the buyer has to pay interest at the rate of 4 per cent. from the date fixed for completion until actual completion.

X. He must do all these things within a reasonable time.

*Compton* v. *Bagley*, [1892] 1 Ch. 313.

Date of contract 25th August.

Date fixed for completion 29th September.

The abstract not having been sent, the buyer wrote on the 13th October that he would refuse to complete if it was not sent within 14 days.

The abstract was sent on the 29th November.

*Held*, unreasonable delay. The buyer may rescind the contract.

Similarly, the buyer must send his requisitions within a reasonable time.

## SECTION II.

### *Particulars and Conditions of Sale.*

When land is sold by auction it is described to the persons who attend the auction by means of printed *Particulars*.

The following is a specimen form :—

PARTICULARS

OF

VALUABLE FREEHOLD PROPERTIES

To be sold by auction at the offices of Messrs. B. and C. on the 12th of December, 1907, at 1 o'clock, precisely.

*Lot* 1.

**VALUABLE AND ATTRACTIVE FREEHOLD RESIDENCE,**

known as *Parklands*, situated on rising ground, facing the high road from X to Y, and comprising—

*Ground floor*: 3 reception rooms, billiard room, kitchen, and offices; *first floor*: 9 bedrooms, bath room, etc.

together with

**WELL-LAID-OUT GARDEN**

and wooded park, containing in the whole

97 acres, 3 roods, 29 poles,

or thereabouts.

The property is situated in the parish of X, in the county of Surrey.

Part of the park containing 20 acres is let on a yearly tenancy to Mr. C. D. at a rent of £20 per annum.

*Lot* 2.

**FREEHOLD COTTAGE,**

known as *Woodside*, etc. . . .

---

The rules of an open contract are generally modified by *conditions of sale*, which are also printed and attached to the particulars.

The following is a form of conditions of sale actually used :—

(The student should read this form with the notes which follow, in order to see the manner in which the rules of an open contract may be modified in practice.)

## CONDITIONS OF SALE.

1. The highest bidder for each lot shall be the Purchaser subject to a reserved price and to a right for the Vendor to bid personally or by his agent, and if any dispute arise between two or more bidders the lot in dispute shall be put up again at the last undisputed bidding. No person shall advance at each bidding less than the sum to be fixed by the Auctioneer, and no bidding shall be retracted.

2. Every Purchaser shall immediately after the sale pay to the Auctioneer a deposit of £10 per centum on the amount of his purchase-money and sign an agreement to complete his purchase according to these conditions.

3. The remainder of the purchase-money for each lot (after deducting the deposit) shall be paid and the purchase thereof completed on the 21st day of December next at the office of Messrs. P. & S the Vendor's Solicitors at and if from any cause whatever any purchase is not completed on that day the Purchaser shall pay to the Vendor interest at £5 per centum per annum on the unpaid balance of the purchase-money from that day until the completion of the purchase. Each Purchaser shall be entitled to possession or receipt of the rents and profits of the lot purchased by him from the said 21st day of December next, all outgoings up to that day being discharged by the Vendor and all current rents and outgoings being (if necessary) apportioned for the purpose of this condition, but nothing in this condition shall prejudice the Vendor's right to require completion or to resell the property under the last of these conditions.

4. The title shall commence as to Lot 1 with a Deed of Conveyance dated the 24th day of September, 1885, and made between R T and others of the one part and M T of the other part.

As to the remaining lots the property forms part of the M Estate and was recently purchased by the Vendor at a Public Sale held on the 16th of July, 1906, upon which occasion the title was fully investigated. It is accordingly stipulated in order to save the unnecessary trouble and expense of another investigation of title that Purchasers shall accept a title commencing with an Indenture dated the 29th day of September, 1906, but if any Purchaser require it he shall be at liberty to have at his own expense an abstract delivered to him of the title as deduced to the Vendor provided he require the same by a written notice to the Vendor's Solicitors.

5. No objection shall be made by any Purchaser that any document forming part of the muniments of title and dated previously to the coming into operation of the Customs and Inland Revenue Act, 1888, is unstamped or insufficiently stamped.

6. No Purchaser shall require any evidence of the identity of the lot purchased by him with any of the property described in the abstracted documents other than a statutory declaration that the property has been held consistently with the title shown by the abstract for the last 12 years, such declaration if required to be furnished at the Purchaser's expense.

7. No Purchaser shall require the Vendor to furnish any further or better evidence of births deaths marriages or other facts affecting the title to the property sold than such as is now in the Vendor's possession or can be obtained by him without trouble or expense except a statutory declaration or statutory declarations as to such facts, which if required shall be furnished at the Purchaser's expense.

8. All objections and requisitions in respect of the title abstract or particulars or anything appearing therein respectively shall be stated in writing

and sent to the Vendor's Solicitors within 10 days from the delivery of the abstract, and if not sent within that time shall be considered waived. An answer to any such objection or requisition is to be replied to in writing within seven days after delivery thereof, otherwise it is to be considered satisfactory; and for the purpose of any objection or requisition an abstract shall be deemed perfect if it supply the information suggesting the same although otherwise defective. In this condition time is to be deemed in all respects as of the essence of the contract. If any objection or requisition shall be made and insisted on which the Vendor shall be unable or unwilling to remove or comply with, and notwithstanding any intermediate negotiation or litigation in respect thereof or attempts to remove or comply with the same, the Vendor shall be at liberty by notice in writing to rescind the sale in which case the Purchaser shall receive back the deposit without interest or costs in full satisfaction of his claims, and shall forthwith return all abstracts and papers in his possession or power belonging to the Vendor.

9. Such of the documents of title in the possession of the Vendor as relate exclusively to any lot shall be delivered to the Purchaser of that lot. Such as relate to more than one lot, but not to property not comprised in this sale or to other matters, shall be delivered to the Purchaser of the largest part in value of the lots to which the same relate after the completion of the sale of all such lots. The last-mentioned documents until such completion and all other documents of title in the possession of the Vendor will be retained by him, and he will give to each Purchaser concerned the proper statutory acknowledgment and undertaking as to production and delivery of copies and safe custody thereof.

10. Lot 1 is sold subject to the existing tenancy

and the several lots to all easements, tithe rent-charge, quit rents, fee farm rents and other incidents of tenure (if any) affecting the same.

11. No evidence other than such as is in the Vendor's possession shall be required of the redemption of any land tax on the property intended to be sold, and if such evidence shall consist of a contract for the redemption of the land tax no requisition shall be made or objection taken that the contract does not sufficiently identify the land redeemed, and no information which shall be given by the Vendor shall be a waiver of this condition; and where no contract or certificate for such redemption or other evidence shall be in the Vendor's possession the Purchaser shall be satisfied with the production of a certificate by the Clerk of the Commissioners of Land Tax for the District that no land tax is assessed on the property beyond any amount mentioned in the particulars of sale, such certificate, if required, to be obtained at the Purchaser's expense.

12. The quantities of the lands forming the several lots are believed and shall be taken to be correctly stated in the particulars, and no compensation or other relief shall be allowed for an error in quantity. If any other material mistake in the particulars shall be discovered before the completion of the purchase a fair compensation shall be made in respect thereof to or by the Purchaser as the case may require, the amount to be settled in case of difference by arbitration; but such compensation (if any) shall be claimed and the amount thereof settled at or before the completion of the purchase, and no compensation under this condition shall be claimed or allowed by or to either party after the completion of the purchase.

LASTLY. If any Purchaser shall fail to comply with these conditions his deposit money shall be forfeited to the Vendor, who shall be at liberty to proceed to another sale either by public auction or

private contract with or without notice to the Purchaser at the present sale, and the deficiency (if any) occasioned by such second sale together with all charges attending the same shall immediately after such sale be made good by the defaulter at this present sale, and in case of non-payment of the same the whole shall be recoverable by the Vendor as and for liquidated damages and it shall not be necessary for the Vendor to tender a Conveyance.

*Memorandum.*

*I, Arthur Andrews, of* 105, *Lothbury in the City of London, do hereby acknowledge that at the sale by auction this day, I was the highest bidder for and declared to be the Purchaser of the property described as Lot* 1 *in the within particulars of sale, at the sum of* £7500, *and that I have paid the sum of* £750 *as a deposit and in part payment of the said purchase-money to Messrs. Box and Cox the Auctioneers and I hereby agree to pay the balance of the said purchase-money, and to complete the purchase according to the Conditions printed within.*

WITNESS *my hand this* 17*th day of July*, 1906.

A. ANDREWS.

| | |
|---|---|
| *Purchase-money* .. .. .. | £7500 |
| *Deposit* .. .. .. .. | 750 |
| *Balance* | £6750 |

*As Agents on behalf of the Vendor Mr. Berkeley Burt* (*p*) *we hereby confirm this sale and acknowledge the receipt of the said deposit.*

Box & Cox.

Each person who bids at the auction makes an offer, which may be revoked at any time before the auctioneer's hammer falls; the offer is accepted when the hammer falls after the highest bid.

(*p*) In order to satisfy the Statute of Frauds the Vendor must be named or sufficiently indicated.

The contract is complete as soon as the hammer falls, but it cannot be *enforced* until there is a memorandum in writing. The buyer and the auctioneer therefore usually sign the memorandum at the end of the conditions (see form on p. 273).

If the buyer refuses to sign, the auctioneer can sign it for him, as he is deemed to be the agent of both parties (*q*).

Note particularly the following points in the form of Conditions of Sale on pp. 269 to 273.

*Condition* 1 deals with the procedure at the auction sale. The provision that no bid shall be retracted is probably void.

*Condition* 2. The deposit is forfeited if the buyer does not carry out the purchase.

*Condition* 3 fixes a date for completion. The outgoings would be apportioned as from that date without any express provision.

*Condition* 4. This clause fixes the date for the commencement of the title. The title here offered to all the lots except Lot 1 is a very short one and would probably deter many persons from bidding (*r*) except as to any of the lots which are very small.

This is a "special condition," *i.e.* one which applies a special rule applicable only to this particular case. Most of the others are "common form" conditions, and are found (with some alterations) in most conditions of sale.

*Condition* 5. Conditions used to contain a clause that the buyer should not object to defective stamps on the deeds. In this way the duty of stamping was frequently avoided. But since the Act mentioned in the condition such a condition is void except as to deeds dated before the 17th of May, 1888, the date of the commencement of the Act.

*Condition* 6. This releases the seller from the duty of proving strictly that the property described in the deeds is the same as the property agreed to be sold.

It does not, however, compel the buyer to take the property where the documents show no satisfactory proof of identity (*s*).

*Condition* 7. *A Statutory Declaration* is a statement on oath

(*q*) See a hard case where the auctioneer signed in the wrong place and the purchaser repudiated, but the repudiation made the memorandum. *Dewar* v. *Mintoft*, [1912] 2 K. B. 373.

(*r*) A condition which is likely to deter buyers is said to be "depreciatory."

(*s*) In some cases it has been held to amount to an undertaking to show identity; so as to enable the buyer to refuse to complete if identity is not properly proved. *Flower* v. *Hartopp*, 6 Beav. 476.

made by the seller or some other person, declaring that certain events have happened, *e.g.* verifying a pedigree.

The declaration cannot be used as evidence in a court of law; but it is accepted as *primâ facie* evidence by conveyancers. If the person who made the declaration is dead, then it may be valuable as evidence, *e.g.* in the case of a pedigree, if it was made by a member of the family.

*Condition* 8. This fixes the time within which the requisitions must be sent in. If they are not sent in within the time specified, the seller need not reply to them, and the title will be deemed to have been accepted. This result is obtained by the words "time shall be of the essence of the contract." If these words are not inserted, equity will allow a reasonable time, even after the time fixed has elapsed.

"*The vendor shall be at liberty to rescind.*" This means that if there is some concealed defect of title, which appears on the examination of the title, and which the seller finds impossible or very difficult to remove, he may declare the whole contract to be at an end.

The seller cannot rely on this provision if—

(i.) he has made misrepresentations (*t*), or

(ii.) if he had no title at all to any part of the property (*u*), or

(iii.) if it would be unreasonable to allow him to withdraw (*x*).

*Condition* 9. Merely states the law which would apply even under an open contract.

The *last condition* is very important, as it gives the seller a power to sell the land again if the first buyer fails to complete his purchase. Without this clause the seller is in a very difficult position, as he will find it hard to sell the property again unless he first gets a judgment for specific performance, and then rescinds the contract for non-compliance with the order. He can then sell, but he cannot recover his loss (if any) from the first buyer, as he cannot both rescind the contract and also claim damages for its breach.

(*t*) *Holliwell* v. *Seacombe*, [1906] 1 Ch. 426.
(*u*) *Bowman* v. *Hyland* (1876), 8 Ch. D. 588.
(*x*) *Quinion* v. *Horne*, [1906] 1 Ch. 596.

## SECTION III.

### *Sale by Private Contract.*

If the land is not sold by auction but privately, the parties usually fix the price by negotiation and then proceed to draw up a formal contract, as the seller does not wish to prove his title as strictly as would be necessary under an open contract.

The contract would then be in the following form.

**AN AGREEMENT** made the 17th day of July, 1907, between *Berkeley Burt* of Richmond in the County of Surrey coal merchant (hereinafter called "the seller") of the one part and *Arthur Andrews* of 105 Lothbury in the City of London Esquire (hereinafter called "the buyer") of the other part,

**WHEREBY IT IS AGREED** as follows :—

(1) The seller agrees to sell and the buyer agrees to buy for the sum of £7500 ALL THAT freehold messuage and hereditament known as Parklands situate at X in the County of Surrey containing 97 a. 3 r. 29 p. or thereabouts (all which hereditaments are described in the plan annexed hereto and are thereon coloured pink) for an estate of inheritance in fee simple free from incumbrances.

(2), (3), (4), etc.

These clauses will be much the same as the clauses in the conditions of sale (pp. 269 to 273), omitting Clause 1 which deals with the auction.

The buyer will also try to procure a clause throwing on to the seller the cost of producing all necessary documents and evidence though not in the seller's possession (see pp. 264 and 265).

## SECTION IV.

### *The Abstract.*

When the contract of sale has been signed in one of the ways mentioned above, the seller sends to the buyer (or his lawyers) an abstract of his title, containing the history of the land.

## FORM OF ABSTRACT.

The following is a form of an abstract of a very short and simple title being the title to Lot 1 mentioned in the particulars and conditions of sale (p. 268).

**ABSTRACT OF THE TITLE** of B. Burt Esquire to hereditaments known as Parklands situate at X in the County of Surrey.

*Indenture of Conveyance* made between *Roger Toyne* and *Winifred Green*, the wife of John Green, of the one part, and *Mary Thompson* of the other part. 24th September, 1885 (*y*). Stamp, £40.

*Reciting* that said R. Toyne and W. Green were seised of the hereditaments thereinafter described as joint tenants for an estate of inheritance in fee simple free from incumbrances

*and reciting* agreement for sale.

*It was witnessed* that in consideration of the sum of £8000 paid by the said M. Thompson to the said R. Toyne and W. Green (the receipt, etc.), the said R. Toyne and W. Green as beneficial owners thereby granted unto the said M. Thompson

**ALL THAT** messuage and hereditament known as Parklands, situate in the parish of X in the County of Surrey and containing by admeasurement 97 a. 3 r. 29 p. or thereabouts, all which hereditaments were delineated and shown on the plan annexed thereto and thereon coloured red.

(*y*) Note that this is the indenture which was agreed by the conditions of sale (clause 4) as the commencement of the title.

*To hold* the said premises unto and to the use of the said M. Thompson in fee simple.

Executed by all parties and attested.

10th March, 1896. *Will* of the said Mary Thompson—

Whereby she devised and bequeathed all her real and personal estate to George Brown and James White upon trust to sell the same and to hold the proceeds of such sale upon the trusts therein mentioned.

And the said testatrix appointed the said G. Brown and J. White executors and trustees of that her will.

Duly executed by the said testatrix in the presence of two witnesses.

11th June, 1899. The said M. Thompson died.

13th July, 1899. *Will proved* by said G. Brown and J. White in the principal Registry of the Probate Division.

1st February, 1904. The said G. Brown died.

2nd May, 1905. *Indenture of Conveyance* made between said *J. White* of the one part, and *Berkeley Burt* of the other part.

Stamp, £38 15s. *Reciting* abstracted indenture of 24th September, 1885.

*And reciting* abstracted will of M. Thompson and her death and probate of her will.

*And reciting* death of said G. Brown.

*It is witnessed* that in consideration of £7750 paid by the said B. Burt to said J. White (the receipt, etc.) the said J. White as trustee thereby granted unto the said B. Burt

*All that* messuage and hereditament described in and conveyed by the before abstracted indenture of the 24th September, 1885.

**TO HOLD** the same unto and to the use of the said B. Burt in fee simple.

*Executed* by both parties and duly attested.

Thus it will be seen that the land has become vested in B. Burt the seller.

The buyer's solicitor then takes the abstract to the office of the seller's solicitors and there compares the abstract with the original deeds, and carefully notes whether all the material parts have been correctly abstracted, and makes a note of the value of the stamps on all the documents.

The buyer's solicitor or his counsel then peruses the abstract and considers carefully whether the history of the estate shows that the seller can convey the fee simple free from all incumbrances.

## SECTION V.

### *Requisitions and Replies.*

If the buyer's solicitor or counsel discovers any apparent defects in the title, or any facts which require proof, he deals with them by means of *requisitions*, which are sent to the seller's solicitor, who sends back his replies to the buyer's queries.

*Form.* These are some of the requisitions which might be asked in respect of the abstract on p. 277.

| *Requisitions.* | *Replies.* |
|---|---|
| 1. When was Winifred Green married? If after the 1st of January, 1883, proof of the date of her marriage must be supplied (*z*). | 1. Winifred Green was married on the 8th of August, 1883. Certificate of her marriage will be produced at the purchaser's expense. |
| 2. A tracing of the plan on the deed of the 24th September, 1885, must be supplied. | 2. There was no plan on this deed. |

(*z*) If she was married before 1st January, 1883, and acquired the property before that date, the conveyance by her alone without her husband would not be sufficient, and she should have been separately examined. See pp. 122 and 123.

| | |
|---|---|
| 3. Probate of the will of Mary Thompson should be produced. | 3. This shall be done. |
| 4. The death of G. Brown on the 1st February, 1904, must be proved by certificate. | 4. This shall be done at the purchaser's expense. |
| Etc. | Etc. |

If any of the replies to the requisitions are considered unsatisfactory, further requisitions are made and further replies returned. When the replies are such that the buyer can safely accept them, the buyer's solicitor or counsel draws up the conveyance.

## SECTION VI.

### *The Conveyance.*

The buyer's solicitor or counsel prepares a draft conveyance, in which he must take care to provide for an effectual conveyance to the buyer of the whole estate in fee simple free from all incumbrances.

The conveyance in this case will be very simple, as the title is simple.

### *Form of Conveyance.*

(Date) (*a*). **THIS INDENTURE** made the 21st day of September, 1907

(Parties.) *Between Berkeley Burt* of Richmond in the County of Surrey coal merchant of the one part and *Arthur Andrews* of 105 Lothbury in the City of London Esquire of the other part.

(Recitals.) *Whereas* the said B. Burt is seised in fee simple of the hereditaments hereinafter described.

(*a*) The words in this column will not appear in the deed, but are the names given to the various parts of the deed.

*And whereas* the said B. Burt has agreed with the said A. Andrews to sell to him the said hereditaments for the price of £7500

*Now this Indenture Witnesseth* that in consideration of the sum of £7500 now paid by the said A. Andrews to the said B. Burt (the receipt whereof is hereby acknowledged) the said B. Burt *as beneficial owner* (*b*) hereby grants unto the said A. Andrews

(Testatum.)
(Consideration.)
(Receipt claim.)
(Operative words.)

*All That* messuage (*c*) and hereditament situate in the parish of X in the County of Surrey and known as Parklands containing by admeasurement 97 a. 3 r. 29 p. or thereabouts.

(Parcels.)

*To Hold* the same unto and to the use of the said Arthur Andrews in fee simple.

(Habendum.)
(Words of limitation.)

*In Witness* whereof the said parties hereto have hereunto set their hands and seals the day and year first above written

(Attestation clause.)

Signed sealed and delivered by the said B. Burt in the presence of John Smith clerk to Messrs. P. & S. Solicitors } B. BURT. (Seal.)

(Similar witness's signature) A. ANDREWS (*d*) (Seal.)

The purchase money (or the balance after payment of the deposit) is paid over to the seller or his solicitor immediately on

(*b*) For the effect of these words see p. 284.
(*c*) Means "house."
(*d*) Except in special cases the purchaser does not execute the deed, although the attestation clause is always framed on the footing that he is going to do so.

the execution of the deed, and the receipt clause in the deed is sufficient evidence that the money has been paid (*e*).

The title deeds are then handed over to the buyer to be kept by him, except where the seller is entitled to retain them (see p. 265). In the latter case the conveyance would contain the acknowledgment and undertaking described on p. 266.

(*e*) Conveyancing Act, 1881, s. 54.

## CHAPTER XXXIII.

### COVENANTS FOR TITLE.

EVEN after the most careful investigation the buyer cannot be perfectly sure that he is acquiring a good title to the land, and, if the title is bad, he may lose the land and has no right of action against the seller: therefore it is usual by way of further precaution to require the seller to covenant that he has a good title, so as to make him liable in damages, if the title turns out to be bad.

The seller, however, is equally uncertain whether the person who sold to him had a good title, and therefore usually declines to guarantee the buyer against defects of title which existed before the land was sold to him or his ancestors.

On a mortgage of land, however, the lender usually refuses to lend his money unless the borrower guarantees his title absolutely.

Before 1881 covenants by the seller were set out in every deed of conveyance, namely that he had a good title to the land free from incumbrances, that the buyer should have quiet possession and that he the seller would do all further acts which might be necessary to convey the whole fee simple in the land to the buyer.

These covenants were very long and were almost always in the same form, so that conveyancers often had lithographed copies which were fastened on to every draft conveyance, and thereby the length and cost of the deed were greatly increased.

On a sale of leaseholds the buyer also required covenants by the seller that the rent had been paid and

the covenants had been performed, otherwise the lease might be forfeited.

Since the Conveyancing Act (*a*) these covenants need not be set out at length, but they *may be implied*, by the use of certain short phrases as follows :—

(A) Where a person conveys and is expressed to convey (*b*) "*as beneficial owner*" the following covenants are implied.

I. *On a sale* (*c*) *of freeholds* or other interests in land.

(i.) That the seller has *power to convey* the land.

(ii.) That the buyer shall have *quiet enjoyment* of the land.

(iii.) That the land is *free from incumbrances ;* and

(iv.) That the seller will do all further acts necessary to assure the land to the buyer. This is called the covenant *for further assurance.*

All these four covenants are *qualified* covenants, *i.e.* in covenant No. (i.) the seller only covenants to be responsible for the acts of

(*a*) himself, and

(*b*) persons through whom he claims otherwise than by purchase for value (which does not include a marriage settlement).

Thus, A sold the land to B.

B died and left the land by will to C.

C agrees to sell it to D.

C will answer for the acts of himself and of B, but will not answer for the acts of A.

In covenants Nos. (ii.), (iii.), and (iv.) the seller covenants in respect of the same persons (*a*) and (*b*), and also

(*c*) persons claiming through him, and

(*d*) persons claiming in trust for him.

(*a*) See Conveyancing Act, s. 7, which is set out on p. 310

(*b*) *I.e.* expressly uses the words "as beneficial owner."

(*c*) The words in the Act are "in a conveyance for valuable consideration other than a mortgage."

A person claiming through the seller means a person who has acquired his interest in the land directly or indirectly from the seller.

*David* v. *Sabin*, [1893] 1 Ch. 523.

Sabin granted a lease to B.

B mortgaged the lease by way of sub-lease.

B then surrendered the lease to Sabin without disclosing the mortgages.

Sabin, thinking the land was free from incumbrances, sold it to David "as beneficial owner."

This of course implied a covenant against incumbrances.

*Held*, Sabin was liable in respect of the mortgages made by B, as B was a "person claiming through him."

II. *On a Sale of Leaseholds.*

(i. to iv.) The same covenants as in I. and also

(v.) *That the lease is valid.*

(vi.) That the *rent has been paid.*

(vii.) That the *covenants in the lease have been performed.*

These are qualified covenants as in I. (i.).

III. *On a Mortgage of Freeholds.*

(i. to iv.) The same covenants as in I., but *absolute i.e.* the mortgagor absolutely guarantees the title in spite of anything that may have been done by anybody.

IV. *On a Mortgage of Leaseholds.*

(i. to iv.) The same as in III., and also

(v.) That the lease is valid.

(vi.) That the rent has been and *will be* paid.

(vii.) That the covenants have been and *will be* performed.

(viii.) An indemnity to the mortgagee.

In the case of a *sale* of leaseholds the purchaser takes possession and becomes himself responsible for payment of rent and performance of the covenants, and therefore does not need

any covenants by the seller as to the future. But in the case of a *mortgage*, the mortgagor remains in possession and the mortgagee wishes to be protected against forfeiture of the lease by reason of breach of covenants or non-payment of rent by the mortgagor after the mortgage.

(B) When a person conveys "*as settlor*" in a settlement, a covenant is implied *that he and all persons claiming under him* will do all further acts necessary to vest the whole estate in the land in the grantee: *i.e.* a covenant for *further assurance* only.

A person who makes a voluntary settlement or gift of land naturally does not wish to bind himself to pay damages to the grantee if there turns out to be some defect in his title.

(C) When a person conveys
"as trustee,"
or "as mortgagee,"
or "as personal representative,"
or "as committee" of a lunatic,
or "under an order of the court,"
he implies a covenant that *he himself has not incumbered the land.*

Each of the expressions above mentioned is therefore used for the purpose of implying long covenants which do not appear on the face of the deed; it is therefore most important that the conveyancer should know exactly what is implied by each of these phrases, and the student should learn almost by heart the effect of these covenants as set out above, and should also read carefully the full wording of section 7 of the Conveyancing Act, which is set out on pp. 310 to 316.

On a lease of land (apart from the Conveyancing Act), the word "demise" implies a covenant by the lessor that the lessee shall have quiet enjoyment, so long as the lessor or persons claiming through him have any interest in the land. See *Budd-Scott* v. *Daniel*, [1902] 2 K. B. 351; *Jones* v. *Lavington*, [1903] 1 K. B. 253; *Markham* v. *Paget*, [1908] 1 Ch. 697.

# CHAPTER XXXIV.

## REGISTRATION.

### SECTION I.

### *Registration of Incumbrances and Claims against Land.*

BY various Acts of Parliament, most of which are now to a great extent superseded by the Land Charges Act of 1900 (*a*), the following claims against land must be registered

(A) in the office of *land registry* in London (*b*) :—

(1) *Judgments and writs of elegit.*

As we have seen (p. 110) a *bonâ fide* purchaser of land will acquire the land free from any writ of *elegit* obtained by a creditor, unless the writ is registered and re-registered every 5 years.

Therefore a purchaser should always search in the register for 5 years back, to see whether any such writs are entered against the name of the seller or other persons entitled to the land during the last 5 years.

(2) *Debts due to the Crown.*

(3) *Lites Pendentes.*

A *lis pendens* is an action which has been commenced against the owner of land, claiming the land or any rights over it. If the owner sells the land during the pendency of the action, the purchaser will be bound by the result of the action if the claimant has registered his claim as a *lis pendens*.

(*a*) 63 & 64 Vict. c. 26.

(*b*) For a fuller summary of the searches that should be made see Williams on Vendor and Purchaser, 2nd ed., Vol. I., p. 597.

(4) *Annuities.*

Annual sums granted to persons for their lives and charged on land should be registered in the same way.

(5) *Deeds of Arrangement.*

A deed, by which a debtor assigns his property to a trustee for the benefit of his creditors generally, is void unless it is registered.

(6) *Land Charges.*

Under certain Acts of Parliament, such as the Improvement of Land Act, 1864 (*c*), money may be raised for the purpose of improvement of the land and other purposes, and becomes by virtue of the Act a first charge on the land.

(B) *On other registers.*

(1) *Copyhold Lands.*—All dealings with copyhold lands are usually entered in the court rolls.

(2) *Lands belonging to a Company.*—Mortgages granted by a company must be registered in certain registers (*d*).

(3) *Bankruptcy.*—If the seller has become bankrupt, his land will have vested in his trustee in bankruptcy, and he will have no power to sell it. The fact of his bankruptcy will be registered at the Bankruptcy Office.

*Consequences of non-registration:* in the case of all of these matters, if they are not registered, they do not affect the land, if bought by a *bonâ fide* purchaser for value. But annuities, though not registered, will be binding on a purchaser for value if he has notice of them (*e*).

(*c*) 27 & 28 Vict. c. 114.

(*d*) See the author's "Principles of Company Law," 3rd ed., pp. 158, 159.

(*e*) Williams on Vendor and Purchaser, 2nd ed., Vol. I., p. 437.

## SECTION II.

### *Registration of Deeds and other Documents.*

In the *Counties of Middlesex and Yorkshire* (*f*) *all deeds and wills* affecting lands should be registered in the County Registers.

The *title* of the owner is not registered under these Acts: but each deed or document dealing with the land is registered separately. This facilitates proof of the title, but does not dispense with investigation of title.

*Effect of Non-registration.*—If a deed or will is not registered it is void as against a subsequent purchaser for value, if that purchaser registers his deed first (*g*). But if a will is registered within six months after the death of the testator, it is as valid as if it had been registered immediately on his death (*h*).

*In Middlesex*, if the second purchaser has express notice of the first unregistered deed, he does not get a good title (*i*).

*In Yorkshire*, the person who registers his deed first gets priority, even if he has actual or constructive notice of the earlier unregistered deed, except in case of fraud (*k*).

## SECTION III.

### *Registration of Title.*

1. *Voluntary.*—By the Land Transfer Acts, 1875 and 1897 (*l*), the owner of land may be registered as the proprietor of that land, and may then transfer the land simply by a registered transfer.

(*f*) And in the Bedford Level.
(*g*) 7 Anne, c. 20, s. 1, and 47 & 48 Vict. c. 54, s. 14.
(*h*) 7 Anne, c. 20, s. 8.
(*i*) *Le Neve* v. *Le Neve* (1748), 3 Atk. 651.
(*k*) Yorkshire Registry Act, 1884, s. 14.
(*l*) 38 & 39 Vict. c. 87, and 60 & 61 Vict. c. 65.

One of the greatest defects of our law of land is the expense which is incurred on a sale. A purchaser is bound to investigate the whole history of the title for 30 or 40 years, and if he sells the land even a short time afterwards, the new purchaser must go through the whole trouble and expense again. This occurs on every sale of the land.

In order to avoid this difficulty the above-mentioned Acts provide that the owner of land may prove his title to a public officer called the Registrar, and if he can prove his title to the Registrar in a manner which would satisfy a purchaser, he may be entered on the register with an absolute title, and any person buying from him need not investigate the title, but gets the whole legal estate, subject only to such mortgages, etc., as are entered on the register, and to certain other rights which are mentioned later.

This reform failed under the Act of 1875, because owners were not bound to incur the cost of registration, and in most cases refused to do so.

Hence the experiment is now being tried of compulsory registration.

2. *Compulsory.*—By the *Land Transfer Act*, 1897, registration of title is (to a certain extent) made *compulsory within the County of London* except the City.

The register under this Act is not a register of deeds and wills under the name of the owner, but is a register of *the land itself* according to its locality.

The following registers are kept :—

1. *A Property Register* which contains a description of the land comprised in the title, refers to the filed plan, and contains other information regarding that particular land.

(2) *A Proprietorship Register.*—This can only be inspected by consent of the registered proprietor. It contains the name of the proprietor, *i.e.* the person who has the power to transfer the land by registered

transfer, subject to any restrictions shown on the register.

(3) *A Charges Register.*—This contains a list of the mortgages and charges created on the land.

The owner of a registered charge does not acquire the legal estate; but priorities depend on the date of registration.

There is also kept in the registry an "Index Map" which is open to the inspection of the public, and shows by colours on the map what land is registered.

Any person interested can also place on the register any of the following:—

(1) *An inhibition* preventing the registered proprietor from dealing with the land at all.

*E.g.* if the proprietor is a married woman restrained from anticipation; or if the proprietor is a tenant for life, and there are no trustees of the settlement.

(2) *A restriction* preventing the registered proprietor from dealing with the land except with the consent of some other person, etc.

*E.g.* if a tenant for life is registered as proprietor of the mansion house, a restriction is entered preventing him from selling it without the consent of the trustees of the settlement (see p. 42).

(3) *A Caution or Notice,* preventing the proprietor from dealing with the land without notice being given to the person who has lodged the caution.

Thus, a person who has commenced an action against the proprietor to restrain him from selling the land can lodge a caution. He thus finds out if the proprietor attempts to sell, and can usually prevent him.

If the person who lodges the caution or restriction has no power to prevent dealings with the land, the proprietor may apply to the Registrar and have it removed.

The title may be registered in one of three ways.

1. *Absolute Title.*—The person first registered as

proprietor with an absolute title gets *an estate in fee simple* in the land subject only to (*m*)

(1) The charges entered on the register.

(2) Easements, and other rights which cannot be entered on the register.

Rights of way and light and similar rights are not entered on the register, and a purchaser must inquire about these in the usual way.

(3) Trusts and other equities.

And the registered proprietor can, by a registered transfer, pass the fee simple to a purchaser subject only to charges (1) and easements, etc. (2), but free from trusts and equities (3) (*n*).

2. *Qualified Title.*—If the owner cannot prove his title fully, because he cannot get rid of some defect of title, he may be registered with a *qualified* title. The effect is the same as registration with an absolute title, but his estate is also subject to the specified defect.

3. *Possessory Title.*—The person desiring to be registered as proprietor of the land has only to show that he is in possession or in receipt of the rents and profits, or to produce a document which shows that he has agreed to buy the land or has power to sell it. He can then be registered with a "possessory" title. The effect is the same as in the case of an absolute title except that his estate is also subject to *any adverse claims which existed or were capable of arising at the time of registration.*

Thus, the register does not guarantee that a person who is registered with possessory title has any title at all, because registration does not defeat any existing claims, whether vested or contingent.

The result is that any one buying land from a person registered in this way must investigate the title in the usual way *down to the date of registration.* After

(*m*) Land Transfer Act, 1875, s 7. (*n*) *Ibid.*, s. 30.

that date, dealings with the land should appear on the register.

*Registration with a possessory title is the only form of registration which is compulsory.*

*Registration is compulsory* only to the following extent—

On any *conveyance on sale* of a sole interest in

(1) *freehold land*, or

(2) *leaseholds* for an unexpired term of *not less* (*o*) *than* 40 *years* or two lives,

in the County of London, the title *must be put on* the Register.

*Interests in land which cannot be put on the Register.*

(1) *Copyholds* and customary freeholds when admittance is necessary to perfect the title.

(2) *Leaseholds* if

(*a*) there is an absolute prohibition against assignment; or

(*b*) there is not more than 21 years still to run; or

(*c*) the lease was created for the purpose of a mortgage.

Thus, where a mortgage is created by sub-lease, the sub-lease cannot be put on the register separately: but is registered as a charge on the leasehold interest.

*Cases in which Registration is optional.*

(1) Incorporeal hereditaments—

Such as rights of way and common.

(2) Mines and minerals.

(3) Leases with less than 40 years or 2 lives, but more than 21 years unexpired.

(4) An undivided share in lands.

(5) Freeholds mixed with copyholds.

(*o*) Act of 1897, s. 24.

(6) Freeholds which are part of a manor.
(7) Estates in remainder.
(8) Equitable estates

Because there does not seem to be any penalty attached to the non-registration of these.

*Effect of Non-registration.*—When land in the compulsory area is not on the register, *a purchaser does not get the legal estate* unless the land is put on the register.

*When the land is once on the register*, the person who has the legal estate can, if he likes, convey it in the ordinary way without registration of the transfer. The purchaser, in this case, gets the legal estate, but he is subject to this risk, that the person, whose name remains on the register as proprietor, may convey the fee simple to some one else by a registered transfer.

The purchaser can protect himself against this by putting a caution or notice on the register.

See *Capital and Counties Bank* v. *Rhodes*, [1903] 1 Ch. 631.

Thus, it would seem that when land has once been registered there is no *necessity* to continue to transfer it by registered transfers. A purchaser can, if he likes, investigate the title, and take a conveyance in the usual way, and simply lodge a caution against the registered proprietor. If the purchaser afterwards sells the land, he can remove his caution, and the new purchaser can put on another caution, and so on. This is, however, dependent on the willingness of each purchaser not to insist on registration; for no clause in the contract precluding him from insisting on this is valid (*p*).

In this and in many other ways the necessity for registration is often avoided in practice. This result is unfortunate, for, whatever be the cause, it would be regrettable if this last attempt to simplify and cheapen the conveyance of land, and remove the risk of fraud, should end in failure, or even in such

(*p*) Act of 1897, s. 16 (2).

comparative failure as would lead to a prolongation for any considerable period of the existing difficulties and complications.

Under the Land Transfer Rules, 1908, the applicant for registration is bound to hand to the Registrar all his title deeds, and the Registrar may register him with an absolute title if he does not object.

# CHAPTER XXXV.

## DEATH DUTIES.

On the death of a person entitled to property the following duties are now payable.

1. Estate duty on the whole estate, varying in amount according to the value of the estate.

2. Succession duty on all land, including leaseholds.

3. Legacy duty on all legacies of personal property other than leaseholds.

The present law on this subject is due in large measure to the Finance Act of 1894 (*a*) as amended by the Finance Acts, 1907 (*b*) and 1910 (*c*).

The duties payable are as follows :—

1. In the case of a person who died before the Finance Act, 1894.

*Personal property* was liable to pay—

(*a*) *Legacy duty* (on the amount of each legacy, varying from 1 to 10 per cent., according to the relationship of the legatee to the deceased).

(*b*) *Probate duty.*—A duty at a fixed rate, payable on all property in respect of which probate was granted.

*Leaseholds* did not pay legacy duty, but were liable to pay—

(*a*) 57 & 58 Vict. c. 30.
(*b*) 7 Ed. 7, c. 13.
(*c*) 10 Ed. 7, c. 8.

(*a*) *Succession duty* on the value (*d*) of the interest which passed to each person entitled.

(*b*) *Probate duty.*

*Freeholds* were liable to pay—

*Succession duty.*

In addition to these, *Temporary Estate duty* of 1 per cent. was charged on all successions of over £10,000.

*Account duty* was also payable on gifts *mortis causâ*, life policies, etc.

2. In the case of a person who died after the 1st of August, 1894 (*e*).

Probate duty, temporary estate duty, and account duty are no longer payable ; but *personal property* still pays legacy duty, and *freehold and leasehold property* still pay succession duty.

And *all property*, real or personal, pays *estate duty*, which varies from 1 per cent. on properties over £100 and not more than £500 to 15 per cent. on properties over £1,000,000 (*f*).

The duties now payable on death in respect of land are therefore—

*Succession Duty.*—This was created in 1853 (*g*), and is payable by each person who succeeds to the beneficial interest in real or personal property (except such personalty as is charged with legacy duty), and the amount varies from 1 to 10 per cent. of the value of the succession according to the relationship to the deceased of the person who takes the succession.

A succession occurs in each of the following cases—

(1) When a tenant in fee simple or owner dies intestate or leaves the property by will.

(*d*) The value on which succession duty was payable was (before 1894) the value of the property considered as an annuity for the life of the successor Since the Act of 1894 (s. 18) the duty is payable on the capital value if the successor is competent to dispose of the property.

(*e*) Finance Act, 1894, s. 24.

(*f*) Finance (1909—10) Act, 1910, 10 Ed. 7, c. 8.

(*g*) 16 & 17 Vict. c. 51.

(2) When one joint tenant dies and the land passes to the survivor.

(3) When a person becomes entitled to property under an exercise of a power of appointment on the death of the appointor.

(4) When a life interest or annuity ceases and thus increases the value of the property which was subject to the life interest or annuity.

(5) When a person dies who has granted his land to another reserving to himself a life interest. (Except where the transaction was a *bonâ fide* sale.)

Succession duty is a first charge on the interest of the successor in the land to which he succeeds.

A purchaser of any land therefore should satisfy himself that any succession duty which is payable has been paid.

The right to claim succession duty is, however, barred, as against a Purchaser or Mortgagee, if not claimed by the revenue authorities within either of the following periods:—

(1) Within 12 years after the death which gave rise to the claim for duty; or

(2) Within 6 years after the authorities had notice of the succession.

Where land is sold under a power of sale, or a trust for sale, the duty is not charged on the land but on the proceeds of sale.

*Exemptions from Succession Duty.*

(1) Husband or wife of deceased in case of small properties (*h*).

(2) Lineal issue or ancestor of deceased if [probate (*i*) duty or] estate duty has been paid.

*Estate Duty.*—This duty is payable on all property, real or personal, *passing on the death* of any person after the 1st of August, 1894.

(*h*) Finance (1909—10) Act, 1910, s. 58 (2).
(*i*) On death before 1894.

On the death of any person the following property is held to "*pass on his death*":—

(i.) Property of which he was competent to dispose when he died.

(ii.) Property in which he had a life interest, or in which any other person had an estate for his (the deceased's) life.

(iii.) Gifts *mortis causâ* and life policies.

(iv.) Annuities which on his death survive to another or in any way benefit another person.

*Exemptions* from estate duty.

(1) Property held by the deceased as a trustee.

If however the deceased himself created the trust, duty is payable unless the beneficiary *bonâ fide* took possession of the property for 3 years before the death.

(2) Property which passes to another on the death of the deceased by reason of a *bonâ fide* sale for full value.

(3) Property of soldiers and sailors killed on active service.

There are several other exemptions, but these are the most important.

*The duty is a charge* on all property which did not pass to the executor as such before the Land Transfer Act, 1897.

Thus the duty is a charge on freehold estates but is not a charge on leasehold estates, because they passed to the executor and it was his duty to pay the estate duty.

Estate duty is barred after 12 years in the same way as succession duty, but there is no exemption in favour of property sold under a power of sale or trust for sale.

A purchaser should therefore demand a certificate to prove that any estate duty which has become payable has been paid.

*Settlement Estate duty.*—When by the will of the deceased (or otherwise on his death) the property is settled in such a way that the first person interested under the settlement cannot dispose of the property, a further duty of 2 per cent. is payable; and then no further duty is payable until the death of the first person who under the settlement has power to dispose of the property.

*E.g.*—A by will settles land on B for life, remainder to C for life, remainder to D in fee simple.

On the death of A settlement estate duty will be payable as well as estate duty, but no estate duty will be payable on the death of B or of C.

On the death of D, estate duty will be payable.

Where the only life interest created is that of the wife or husband of the deceased no settlement estate duty is payable.

Abolished by Finance Act 1914. s. 14.

# CHAPTER XXXVI.

## PRINCIPAL STATUTORY PROVISIONS RELATING TO REAL PROPERTY (*a*).

### 1285. 13 Ed. I. c. 1. *De Donis.*

Created estates tail—see p. 28.

### 1290. 18 Ed. I. c. 1. *Quia Emptores.*

Abolished subinfeudation—see p. 13.

### 1536. 27 Hen. VIII. c. 10. *Statute of Uses.*

Discussed and explained on pp. 62 to 65.

### 1677. 29 Car. II. c. 3. *Statute of Frauds.*

S. 1. *All leases estates* interests of freehold or terms of years or any uncertain interest of in to or out of any messuages manors lands tenements or hereditaments made or created by livery and seisin only or by parol and *not put in writing and signed* by the parties so making or creating the same or their agents thereunto lawfully authorised by writing shall have the force and effect of *leases or estates at will* only and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates or any former law or usuage to the contrary notwithstanding.

S. 2. *Except* nevertheless all *leases not exceeding the term of three years* from the making thereof whereupon the rent reserved to the landlord during such term shall amount unto *two third parts at the least of the full improved value* of the thing demised.

(*a*) The student should read each of these enactments carefully in conjunction with the explanation and short statement of its effect in the earlier part of the book.

S. 3. And moreover no leases estates or interests either of freehold or terms of years or any uncertain interest not being copyhold or customary interest of in to or out of any messuages manors lands tenements or hereditaments shall at any time after the said 24th day of June (*b*) be *assigned* granted or surrendered unless it be by deed or note in writing signed by the party so assigning granting or surrendering the same or their agents thereunto lawfully authorised by writing or by act and operation of law.

S. 4. And be it further enacted that from and after the said 24th day of June, no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt default or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

S. 7. And be it further enacted that all *declarations* or creations *of trusts* or confidences of any *lands* tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust or by his last will in writing or else they shall be utterly void and of none effect.

S. 8. Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result *by the implication or construction of law* or be transferred or extinguished by any act or operation of law then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made: anything hereinbefore contained to the contrary notwithstanding.

S. 9. And be it further enacted that all grants and *assignments of any trust* or confidence shall likewise be in writing signed

(*b*) *I.e.* the 24th of June, 1677, the date of the commencement of the statute.

by the party granting or assigning the same or by such last will or devise or else shall likewise be utterly void and of none effect.

1800. 39 & 40 Geo. III. c. 98. *Accumulations Act.*

S. 1. No person or persons shall after the passing of this Act by any deed or deeds surrender or surrenders will codicil or otherwise howsoever settle or dispose of any real or personal property so and in such manner that the rents issues profits or produce thereof shall be wholly or partially *accumulated* for any longer term than the *life* or lives of any such grantor or grantors settler or settlers or the term of 21 *years from the death* of any such grantor settler devisor or testator or during the *minority* or respective minorities *of any person* or persons who shall be *living* or in ventre sa mere *at the time of the death of such grantor* devisor or testator or during the *minority* or respective minorities only of *any person* or persons who under the uses or trusts of the deed surrender will or other assurances directing such accumulations *would for the time being if of full age be entitled* unto *the rents* issues and profits or the interest dividends or annual produce so directed to be accumulated and in every case where any accumulation shall be directed otherwise than as aforesaid such direction shall be null and void and the rents issues profits and produce of such property so directed to be accumulated shall so long as the same shall be directed to be accumulated contrary to the provisions of this Act go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

S. 2. Provided always that nothing in this Act contained shall extend to any provision for *payment of debts* of any grantor settler or devisor or any other person or persons or to any provision for *raising portions* for any child or children of any grantor settler or devisor or any child or children of any person taking any interest under any such conveyance settlement or devise or to any direction touching *the produce of timber* or wood upon any lands or tenements but that all such provisions and directions shall and may be made and given as if this Act had not passed.

1832. 2 & 3 Will. IV. c. 71. *Prescription Act.*

S. 1. *No claim* which may be lawfully made at the common

law by custom prescription or grant *to any right of common or other profit* or benefit to be taken and enjoyed from or upon any land of our sovereign lord the king his heirs or successors or any land being parcel of the duchy of Lancaster or of the duchy of Cornwall or *of any ecclesiastical or lay person or body corporate* except such matters and things as are herein specially provided for and except tithes rents and services shall where such right profit or benefit shall have been *actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years be defeated or destroyed by showing only that such right profit or benefit was first taken and enjoyed at any time prior to such period of thirty years* but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated and when such right profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty years* the right thereto shall be deemed absolute and indefeasible unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose *by deed or writing*.

S. 2. No claim which may be lawfully made at the common law by custom prescription or grant to any *way or other easement* or to any *watercourse* or the use of any water to be enjoyed or derived upon over or from any land or water of our said lord the king his heirs or successors or being parcel of the duchy of Lancaster or of the duchy of Cornwall or being the property of any ecclesiastical or lay person or body corporate when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of *twenty years* shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of *forty years* the right thereto shall be deemed absolute and indefeasible unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

S. 3. When the access and use of *light* to and for any dwelling-house workshop or other building shall have been actually enjoyed

therewith for the full period of *twenty years* without interruption the right thereto shall be deemed absolute and indefeasible any local usuage or custom to the contrary notwithstanding unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

S. 4. Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period *next before some suit or action* wherein the claim or matter to which such period may relate shall have been or shall be brought into question and no act or other matter shall be deemed to be an interruption within the meaning of this statute unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorising the same to be made.

S. 7. Provided also that the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an *infant* idiot non compos mentis feme covert or tenant for life or during which any action or suit shall have been pending and which shall have been diligently prosecuted until abated by the death of any party or parties thereto shall be excluded in the computation of the periods hereinbefore mentioned except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

S. 8. Provided always that when any land or water upon over or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of life or *any term of years exceeding three years* from the granting thereof the time of the enjoyment of any such way or other matter as herein last before mentioned during the continuance of such term shall be excluded in the computation of the said period of forty years in case the claim shall within *three years* next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

1833. 3 & 4 Will. IV. c. 74. *Act for the Abolition of Fines and Recoveries* (see pp. 32 and 33).

## 1833. 3 & 4 Will. IV. c. 105. *Dower Act.*

S. 2. When a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law and such interest whether wholly equitable or partly legal and partly equitable shall be an estate of inheritance in possession or *equal to an estate of inheritance* in possession (other than an estate in joint-tenancy) then his *widow shall be entitled in equity to dower* out of the same land.

S. 3. When a husband shall have been entitled to a right of entry or action in any land and his widow would be entitled to dower out of the same if he had recovered possession thereof she shall be entitled to dower out of the same *although her husband shall not have recovered possession* thereof provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

S. 4. *No widow shall be entitled to dower out of any land* which shall have been absolutely *disposed of by her husband in his lifetime or by his will.*

S. 6. A widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him or by any deed executed by him it shall be *declared that his widow shall not be entitled to dower* out of such land.

S. 8. The right of a widow to dower shall be subject to any conditions restrictions or directions which shall be declared by the will of her husband duly executed as aforesaid.

S. 9. Where a husband shall devise any land out of which his widow would be entitled to a dower if the same were not so devised or any estate or interest therein to or for the benefit of his widow such widow shall not be entitled to dower out of or in land of her said husband, unless a contrary intention shall be declared by his will.

## 1837. 7 Will. IV. & 1 Vict. c. 26. *Wills Act.*

S. 9. No Will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the Foot or End thereof by the Testator or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the Testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the

will in the presence of the testator, but no form of attestation shall be necessary.

S. 11. Provided always that any soldier being in Actual Military Service or any Mariner or Seaman being at Sea may dispose of his Personal Estate as he might have done before the making of this Act.

S. 15. If any person shall attest the execution of a will to whom or to whose wife or husband any beneficial devise legacy estate interest gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any Debt or Debts) shall be thereby given or made such devise legacy estate interest gift or appointment shall so far only as concerns such person attesting the Execution of such will or the wife or husband of such person or any person claiming under such person or wife or husband be utterly null and void and such person so attesting shall be admitted as a Witness to prove the execution of such will or to prove the validity or invalidity thereof notwithstanding such devise legacy estate interest gift or appointment mentioned in such will.

S. 18. Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir customary heir executor or administrator or the person entitled as his or her next of kin under the statute of distributions).

S. 20. No Will or codicil or any part thereof shall be revoked otherwise than as aforesaid or by another Will or codicil executed in manner hereinbefore required or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed or by the burning tearing or otherwise destroying the same by the Testator or by some person in his presence and by his direction with the intention of revoking the same.

S. 24. Every will shall be construed with reference to the real estate and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear by the will.

S. 25. Unless a contrary intention shall appear by the will such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained which

shall fail or be void by reason of the death of the devisee in the lifetime of the Testator or by reason of such devise being contrary to law or otherwise incapable of taking effect shall be included in the residuary devise (if any) contained in such will.

S. 28. Where any real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee simple, or other the whole estate or interest which the Testator had power to dispose of by will in such Real estate unless a contrary intention shall appear by the Will.

S. 32. Where any person to whom any real estate shall be devised for an estate tail or an Estate in quasi entail shall die in the lifetime of the Testator leaving Issue who would be heritable under such entail and any such issue shall be living at the time of the Death of the Testator such Devise shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the Testator unless a contrary intention shall appear by the Will.

S. 33. Where any person being a child or other issue of the Testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime leaving issue and any such issue of such person shall be living at the time of the death of the testator such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator unless a contrary intention shall appear by the Will.

## 1845. 8 & 9 Vict. c. 106. *Real Property Amendment Act.*

S. 2. After the 1st day of October 1845 all corporeal tenements and hereditaments shall as regards the conveyance of the immediate freehold thereof be deemed to lie in grant as well as in livery.

S. 8. A *contingent remainder* existing at any time after the 31st day of December 1844 shall be and if created before the passing of this Act shall be deemed to have been capable of taking effect notwithstanding the determination by *forfeiture surrender or merger* of any preceding estate of freehold in the same manner in all respects as if such determination had not happened.

### 1845. 8 & 9 Vict. c. 112. *Assignment of Satisfied Terms Act.*

S. 1. Every satisfied term of years which either by express declaration or by construction of law shall upon the 31st day of December 1845 be attendant upon the inheritance or reversion of any lands shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid except that every such term of years which shall be so attendant as aforesaid by express declaration although hereby made to cease and determine shall afford to every person the same protection against every incumbrance charge estate right action suit claim and demand as it would have afforded to him if it had continued to subsist but had not been assigned or dealt with after the said 31st day of December 1845 and shall for the purposes of such protection be considered in every court of law and of equity to be a subsisting term.

S. 2. Every term of years now subsisting or hereafter to be created becoming satisfied after the said 31st day of December 1845 and which either by express declaration or by construction of law shall after that day become attendant upon the inheritance or reversion of any lands shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.

### 1869. 32 & 33 Vict. c. 46. *Hinde Palmer's Act.*

S. 1. In the administration of the estate of every person who shall die on or after the 1st day of January 1870 no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond deed or other instrument under seal or is otherwise made or constituted a specialty debt but all the creditors of such person as well specialty as simple contract shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person whether such assets are legal or equitable any statute or other law to the contrary notwithstanding: provided always that this Act shall not prejudice or affect any lien charge or other security which any creditor may hold or be entitled to for the payment of his debt.

1874. 37 & 38 Vict. c. 57. *Real Property Limitation Act.*

S. 1. After the commencement of this Act no person shall make an entry or distress or bring an action or suit to recover any land or rent but within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress or to bring such action or suit shall have first accrued to the person making or bringing the same.

1877. 40 & 41 Vict. c. 33. *Contingent Remainders Act.*

S. 1. Every contingent remainder created by any instrument executed after the passing of this Act or by any will or codicil revived or republished by any will or codicil executed after that date in tenements or hereditaments of any tenure which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder (*c*) shall in the event of the particular estate determining before the contingent remainder vests be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.

1881. 44 & 45 Vict. c. 41. *Conveyancing Act*, 1881.

S. 7. (1) In a conveyance there shall in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases by virtue of this Act, be *implied*, a *covenant* to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter

(*c*) It has been suggested that a gift without a use, "to A for life remainder to his first son who shall reach 21," would not be saved by this Act if A died before the son reached 21, because a grant "to the first son of A. who shall reach 21," standing by itself, and thus not having "a sufficient estate to support it as a contingent remainder," would be void at Common law. This may be so, although the Courts would probably strive to give the fullest possible effect to the statute.

or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made, as joint tenants or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

(A) *In a conveyance for valuable consideration other than a mortgage* the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value made done executed or omitted or knowingly suffered the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction *full power to convey* the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that notwithstanding anything as aforesaid that subject-matter shall remain to and be *quietly entered upon* received *and* held occupied *enjoyed* and taken by the person to whom the conveyance is expressed to be made and any person deriving title under him and the benefit thereof shall be received and taken accordingly without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by through under or in trust for the person who so conveys or any person conveying by his direction or by through or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made through whom the person who so conveys derives title otherwise than by purchase for value; and that, *freed and discharged from* or otherwise by the person who so conveys sufficiently indemnified against all such estates *incumbrances* claims and demands other than those subject to which the conveyance is expressly made as either before or after the date of the conveyance have been or shall be made occasioned or suffered by that person or by any person conveying by his direction or by any person rightfully claiming by through under or in trust for the person who so conveys or by through or under any person conveying by his direction or by through or under any one through whom the person who so conveys derives title otherwise than by purchase for value and further that the person who so conveys and any person conveying by his

direction and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance other than an estate or interest subject whereto the conveyance is expressly made by through under or in trust for the person who so conveys or by through or under any person conveying by his direction or by through or under any one through whom the person who so conveys derives title otherwise than by purchase for value will from time to time and at all times after the date of the conveyance on the request and at the cost of any person to whom the conveyance is expressed to be made or of any person deriving title under him execute and do *all such lawful assurances and things for further or more perfectly assuring* the subject-matter of the conveyance to the person to whom the conveyance is made and to those deriving title under him subject as if so expressed and in the manner in which the conveyance is expressed to be made as by him or them or any of them shall be reasonably required: (in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

(B) *In a conveyance of leasehold property for valuable consideration other than a mortgage* the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That notwithstanding anything by the person who so conveys or anyone through whom he derives title otherwise than by purchase for value made done executed or omitted or knowingly suffered *the lease* or grant creating the term or estate for which the land is conveyed is at the time of conveyance a good *valid* and effectual lease or grant of the property conveyed and is in full force unforfeited unsurrendered and is nowise become void or voidable and that notwithstanding anything as aforesaid all the *rents* reserved by and all the *covenants* conditions and agreements contained in the lease or grant and on the part of the lessee or grantee and the persons deriving title under him to be paid observed and performed have been *paid* observed *and performed* up to the time of conveyance:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage):

(C) In a *conveyance by way of mortgage* the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That the person who so conveys has with the concurrence of every other person if any conveying by his direction full *power to convey* the subject-matter expressed to be conveyed by him subject as if so expressed and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance or any interest thereon or any part of that money or interest contrary to any provision in the conveyance it shall be lawful for the person to whom the conveyance is expressed to be made and the persons deriving title under him to enter into and upon or receive and thenceforth *quietly hold occupy and enjoy* or take and have the subject-matter expressed to be conveyed or any part thereof without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that *freed and discharged from* or otherwise by the person who so conveys sufficiently indemnified against all estates *incumbrances* claims and demands whatever other than those subject whereto the conveyance is expressly made; and further that the person who so conveys and every person conveying by his direction and every person deriving title under any of them and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance or any part thereof other than an estate or interest subject whereto the conveyance is expressly made will from time to time and at all times on the request of any person to whom the conveyance is expressed to be made or of any person deriving title under him but as long as any right of redemption exists under the conveyance at the cost of the person so conveying or of those deriving title under him and afterwards at the cost of the person making the request execute and do all such lawful assurances and things for *further* or more perfectly *assuring* the subject-matter of conveyance, and every part thereof to the person to whom the conveyance is made and to those deriving title under him subject as if so expressed and in the manner in which the conveyance is expressed to be made as by him or them or any of them shall be reasonably required:

(D) In a conveyance by way of *mortgage of leasehold* property the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That the *lease* or grant creating the term or estate for which the land is held is, at the time of conveyance a good *valid* and effectual lease or grant of the land conveyed and is in full force unforfeited and unsurrendered and in nowise become void or voidable and that all the *rents* reserved by and all the *covenants* conditions and agreements contained in the lease or grant and on the part of the lessee or grantee and the persons deriving title under him to be paid observed and performed *have been paid observed and performed* up to the time of conveyance; and also that the person so conveying or the persons deriving title under him *will at all times* so long as any money remains on the security of the conveyance *pay observe and perform* or cause to be paid observed and performed all the *rents* reserved by and all the *covenants* conditions and agreements contained in the lease or grant and on the part of the lessee or grantee and the persons deriving title under him to be paid observed and performed and will keep the person to whom the conveyance is made and those deriving title under him indemnified against all actions proceedings costs charges damages claims and demands if any to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants conditions and agreements or any of them:

(E) In a conveyance by way of *settlement* the following covenant by a person who conveys and is expressed to convey "as settlor" (namely):

That the person so conveying and every person deriving title under him by deed or act or operation of law in his life-time subsequent to that conveyance or by testamentary disposition of devolution in law on his death will from time to time and at all times after the date of that conveyance at the request and cost of any person deriving title thereunder execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under him subject as if so expressed and in the manner in which the conveyance is expressed to be made as by them or any of them shall be reasonably required:

(F) In *any conveyance* the following covenant by every person who conveys and is expressed to convey as *trustee* or mortgagee or as personal representative of a deceased person or as committee

of a lunatic so found by inquisition or under an order of the Court which covenant shall be deemed to extend to every such person's own acts only (namely) :

That the *person so conveying has not* executed or done or knowingly suffered or been party or privy to any deed or thing whereby or by means whereof the subject-matter of the conveyance or any part thereof is or may be impeached charged affected or *incumbered* in title estate or otherwise or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance or any part thereof in the manner in which it is expressed to be conveyed.

(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys then within this section the person giving the direction whether he conveys and is expressed to convey as beneficial owner or not shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction and a covenant on his part shall be implied accordingly.

(3) Where a wife conveys and is expressed to convey as beneficial owner and the husband also conveys and is expressed to convey as beneficial owner then within this section the wife shall be deemed to convey and to be expressed to convey by direction of the husband as beneficial owner and in addition to the covenant implied on the part of the wife there shall also be implied first a covenant on the part of the husband as the person giving that direction and secondly a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

(4) Where in a conveyance a person conveying is not expressed to convey as beneficial owner or as settlor or as trustee or as mortgagee or as personal representative of a deceased person or as committee of a lunatic so found by inquisition or under an order of the Court or by direction of a person as beneficial owner no covenant on the part of the person conveying shall be by virtue of this section implied in the conveyance.

(5) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land but does

not include a demise by way of lease at a rent or any customary assurance other than a deed conferring the right to admittance to copyhold or customary land.

(6) The benefit of a covenant implied as aforesaid shall be annexed and incident to and shall go with the estate or interest of the implied covenantee and shall be capable of being enforced by every person in whom that estate or interest is for the whole or any part thereof from time to time vested.

(7) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8) This section applies only to conveyances made after the commencement of this Act.

S. 14. (1) A right of *re-entry or forfeiture* under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease *shall not be enforceable*, by action, or otherwise unless and *until the lessor serves on the lessee a notice* specifying the particular breach complained of and, if the breach is capable of remedy requiring the lessee to remedy the breach and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach if it is capable of remedy and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

(6) This section does not extend—

(i.) To a covenant or condition against the assigning underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee or on the taking in execution of the lessee's interest or

(ii.) In case of a mining lease to a covenant or condition for allowing the lessor to have access to or inspect books accounts records weighing-machines or other things or to enter or inspect the mine or the workings thereof.

S. 19. (1) *A mortgagee*, where the mortgage is made *by deed*, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the Mortgage Deed, but not further (namely):

(i.) A power, when the mortgage money has become due, *tosell*, or to concur with any other person in selling, the mortgaged property, or any part thereof either subject to prior charges or not and either together or in lots, by public auction or by private contract subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit with power to vary any contract for sale and to buy in at an auction or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

(ii.) A power at any time after the date of the mortgage deed *to insure* and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature whether affixed to the freehold or not being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, and with the same priority, and with interest at the same rate as the mortgage money; and

(iii.) A power, when the mortgage money has become due, *to appoint a receiver* of the income of the mortgaged property, or of any part thereof; and

(iv.) A power, while the mortgagee is in possession to cut and sell *timber* and other trees ripe for cutting and not planted or left standing for shelter or ornament or to contract for any such cutting and sale to be completed within any time not exceeding twelve months from the making of the contract.

S. 20. A mortgagee shall not exercise the power of sale conferred by this Act unless and until—

(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors and default has been made in payment of the mortgage money or of part thereof for three months after such service; or

(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(iii.) There has been a breach of some provision contained in the mortgage deed or in this Act or on the part

of the mortgagor or of some person concurring in making the mortgage to be observed or performed other than and besides a covenant for payment of the mortgage money or interest thereon.

S. 30. (1) *Where an estate* or interest of inheritance, or limited to the heir as special occupant in any tenements or hereditaments corporeal or incorporeal, *is vested on any trust, or by way of mortgage, in any person solely,* the same shall, on his death, *notwithstanding any testamentary disposition devolve to* and become vested in *his personal representatives* or representative from time to time in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers for one only of several joint personal representatives as well as for a single personal representative and for all the personal representatives together to dispose of and otherwise deal with the same shall belong to the deceased's personal representatives or representative from time to time with all the like incidents, but subject to all the like rights equities and obligations as if the same were a chattel real vesting in them or him; and, for the purposes of this section the personal representatives for the time being of the deceased shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

S. 51. (1) In a deed it shall be sufficient in the limitation of an estate in fee simple, to use the words *in fee simple* without the word heirs; and in the limitation of an estate in tail to use the words *in tail* without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male or in tail female as the case requires without the words heirs male of the body, or heirs female of the body.

(2) This section applies only to deeds executed after the commencement of this Act.

S. 65. (1) Where a residue unexpired of not less than two hundred years of a term which as originally created was for not less than three hundred years is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder or other person entitled in reversion expectant on the term and without any rent or with merely a peppercorn rent or other rent having no money value,

incident to the reversion or having had a rent not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released or has become barred by lapse of time or has in any other way ceased to become payable then *the term may be enlarged into a fee simple* in the manner and subject to the restrictions in this section provided.

(2) Each of the following persons (namely):

(i.) Any person beneficially entitled in right of the term whether subject to an incumbrance or not, to possession of any land comprised in the term; but in case of a married woman, with the concurrence of her husband unless she is entitled for her separate use whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee in right of the term or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested whether subject to any incumbrance or not;

shall as far as regards the land to which he is entitled or in which he is interested in right of the term in any such character as aforesaid have power by deed to declare to the effect that from and after the execution of the deed the term shall be enlarged into a fee simple.

(3) Thereupon by virtue of the deed and of this Act the term shall become and be enlarged accordingly and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(4) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts powers executory limitations over rights and equities and to all the same covenants and provisions relating to user and enjoyment and to the same obligations of every kind as the term would have been subject to if it had not been so enlarged.

(5) But where any land so held for the residue of a term has been settled in trust by reference to other land being freehold land so as to go along with that other land as far as the law permits and at the time of enlargement the ultimate beneficial

interest in the term whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person then the estate in fee simple acquired as aforesaid shall without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term be liable to be and shall be conveyed and settled in like manner as the other land being freehold land aforesaid and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

(6) The estate in fee simple so acquired shall whether the term was originally created without impeachment of waste or not include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right or in fact or have not been severed or reserved by an inclosure Act or award.

(7) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

1882. 45 & 46 Vict. c. 39. *Conveyancing Act*, 1882.

S. 10. (1) Where there is a person entitled to land for an estate in fee or for a term of years absolute or determinable on life or for a term of life with an executory *limitation over on default or failure of all or any of his issue* whether within or at any specified period or time or not that executory limitation shall be or become void and incapable of taking effect if and as soon as there is living *any issue* who has attained the age of *twenty-one years* of the class on default or failure whereof the limitation over was to take effect.

(2) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

1882. 45 & 46 Vict. c. 75. *Married Women's Property Act.*

S. 1. (1) A married woman shall in accordance with the provisions of this Act be capable of acquiring holding and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a feme sole without the intervention of any Trustee.

(2) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract and of suing and being sued either in contract or in tort or otherwise in all respects as if she were a feme sole and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceedings brought by or taken against her and any damages or costs recovered by her in any such action or proceeding shall be her separate property and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

(3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown (*d*).

(4) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract but also all separate property which she may thereafter acquire.

(5) Every married woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws in the same way as if she were a feme sole.

## 1888. 51 & 52 Vict. c. 42. *Mortmain and Charitable Uses Act.*

S. 1. (1) Land shall not be assured to or for the benefit of, or acquired by or on behalf of, any corporation in Mortmain, otherwise than under the authority of a license from Her Majesty the Queen, or of a statute for the time being in force, and if any land is so assured otherwise than as aforesaid the land shall be forfeited to Her Majesty from the date of the assurance and Her Majesty may enter on and hold the land accordingly.

(2) Provided as follows :

(i.) If the land is held directly of a mesne lord under Her Majesty, that mesne lord may enter on and hold the land at any time within twelve months from the date of the assurance.

(*d*) But see now the Married Women's Property Act, 1893.

(ii.) If the land is held of more than one mesne lord in gradation under Her Majesty, the superior of those mesne lords may enter on and hold the land at any time within six months after the time at which the right of the inferior lord to enter on the land expires.

(iii.) If a mesne lord is at the time when his right of entry accrues under this Act a lunatic or otherwise under incapacity, his right of entry may be exercised by his guardian or the committee of his estate, or by such person as Her Majesty's High Court of Justice may appoint in that behalf.

(iv.) If the right of entry under this Act is exercised by or on behalf of a mesne lord, the land shall be forfeited to that lord from the date of the assurance instead of to Her Majesty.

## 1897. 60 & 61 Vict. c. 65. *Land Transfer Act.*

### PART I.

*Establishment of a Real Representative.*

S. 1. (1) Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

(3) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

(4) The expression "real estate," in this part of this Act, shall not be deemed to include land of copyhold tenure, or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

(5) This section applies only in cases of death after the commencement of this Act.

S. 2. (1) Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased

person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

(2) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority or the court, to sell or transfer real estate.

(3) In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

(4) Where a person dies possessed of real estate, the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by rules of court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

S. 3. (1) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent

or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

1907. 7 Ed. VII. c. 18. *Married Women's Property Act.*

S. 1. (1) A married woman is able without her husband to dispose of or to join in disposing of real or personal property held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a feme sole.

# CHAPTER XXXVII.

## FORMS OF DOCUMENTS.

### FORM I.

### SPECIMEN FORM OF A MORTGAGE OF FREEHOLDS (*a*).

**This Indenture** made the 14th day of December 1907 BETWEEN ARCHIBALD FITZGERALD of St. James Street in the County of London Esquire (hereinafter called "the Borrower" which expression shall where the context so admits include his personal representatives and assigns) of the one part and LOUIS MOSES of the City of London gentleman (hereinafter called "the Mortgagee" which expression shall where the context so admits include his personal representatives and assigns) of the other part. WHEREAS the Borrower is seised in fee simple of the hereditaments hereinafter mentioned free from incumbrances AND WHEREAS the Mortgagee has agreed to lend to the Borrower the sum of £500 upon having the repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing. **Now this Indenture Witnesseth** that in pursuance of the said agreement and in consideration of the sum of £500 now paid to the Borrower by the Mortgagee (the receipt whereof is hereby acknowledged) the Borrower hereby covenants

(*a*) This is the form which the mortgage referred to on p. 224 might take.

with the Mortgagee to pay to him on the 14th day of June next the sum of £500 with interest thereon in the meantime at the rate of £5 per cent. per annum from the date of these presents AND FURTHER if the said money shall not be so paid to pay to the Mortgagee interest at the rate aforesaid by equal half-yearly payments on the 14th day of June and the 14th day of December in every year on the principal moneys for the time being remaining due on this security. **And this Indenture Also Witnesseth** that in pursuance of the said agreement and for the consideration aforesaid the Borrower as beneficial owner hereby conveys unto the Mortgagee ALL THAT Freehold house known as Woodside situated (etc. . . .) TO HOLD the same premises Unto and to the use of the Mortgagee in fee simple subject to the proviso for redemption hereinafter contained. PROVIDED ALWAYS that if the Borrower shall on the said 14th day of June next pay to the Mortgagee the sum of £500 with interest thereon at the rate aforesaid the Mortgagee will thereupon on demand re-convey to the use of the Borrower in fee simple the hereditaments and premises hereinbefore mortgaged. IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

(Executed in the same way as on p. 281, but not usually by the mortgagee.)

*Note.*—This form would usually contain covenants to insure and other covenants (*b*), but as these are not absolutely necessary and as this form is not intended as a precedent, they are omitted for brevity.

(*b*) See "Encyclopædia of Forms," vol. viii. p. 521.

## FORM II.

### MORTGAGE OF COPYHOLDS TO TWO MORTGAGEES.

**This Indenture** made the 14th day of December 1907 BETWEEN ARCHIBALD FITZGERALD of St. James Street in the County of London Esquire (hereinafter called "the Borrower") of the one part and LOUIS MOSES of gentleman and JOHN GRAHAM of gentleman (hereinafter called "the Mortgagees") of the other part. WHEREAS the Borrower was on the 4th day of December 1900 admitted tenant on the court rolls of the manor of Ewhurst in the County of Surrey of the hereditaments hereinafter mentioned to hold at the will of the lord according to the custom of the said manor AND WHEREAS the Mortgagees have agreed to lend to the Borrower the sum of £500 out of moneys belonging to them upon a joint account upon having the repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing **Now this Indenture Witnesseth** that in pursuance of the said agreement and in consideration of the sum of £500 now paid to the Borrower by the Mortgagees (the receipt whereof is hereby acknowledged) the Borrower hereby covenants with the Mortgagees to pay to them on the 14th day of June next the sum of £500 with interest thereon in the meantime at the rate of £4 per cent. per annum from the date of these presents. And if the said sum shall not be paid on that day then so long as any part thereof shall remain owing to pay to them interest at the rate aforesaid by equal half-yearly payments on the 14th day of June and the 14th day of December. **And this Indenture Also Witnesseth** that in further pursuance of the said agreement and for the consideration aforesaid the Borrower as beneficial owner hereby covenants

with the Mortgagees that the Borrower or his heirs and all other necessary parties if any will at his or their own cost surrender into the hands of the lord of the said manor according to the custom thereof ALL THAT messuage and hereditament known as Parkhurst containing 59 acres 3 roods or thereabouts TO THE USE of the Mortgagees their heirs and assigns at the will of the lord according to the custom of the said manor. But subject to a condition for the avoidance of such surrender if the Borrower his heirs executors administrators or assigns shall on the said 14th day of June next pay to the Mortgagees their executors administrators or assigns the said sum of £500 with interest for the same in the meantime at the rate aforesaid. PROVIDED ALWAYS and it is HEREBY DECLARED that the Borrower his heirs and assigns shall until such surrender or payment as aforesaid stand seised of the said hereditaments hereinbefore covenanted to be surrendered in trust for the Mortgagees their heirs and assigns and THE BORROWER hereby irrevocably appoints the Mortgagees their executors administrators and assigns his attorney and attorneys for the purpose of effecting in his name and by all necessary means such surrender as aforesaid.

IN WITNESS, etc., as in the last form.

*Note.*—For further covenants and provisoes which may be added, see "Encyclopædia of Forms," vol. viii. pp. 610–612.

## FORM III.

### FORM OF A MORTGAGE OF LEASEHOLDS.

**This Indenture** made the 14th day of December 1907 BETWEEN ARCHIBALD FITZGERALD of St. James Street in the County of London Esquire (hereinafter called "the Borrower" which

expression where the context so admits shall include his personal representatives and assigns) of the one part and LOUIS MOSES of gentleman (hereinafter called "the Mortgagee" which expression where the context so admits shall include his personal representatives and assigns) of the other part. WHEREAS by an Indenture of Lease dated the 4th day of December 1900 and made between Margaret Redaway of the one part and the Borrower of the other part the said Margaret Redaway demised to the Borrower the hereditaments described in the schedule hereto from the 24th day of June, 1900 for the term of sixty years at the yearly rent of £50 and subject to the performance and observance of the Lessee's covenants and conditions therein contained AND WHEREAS the Mortgagee has agreed to lend to the Borrower the sum of £500 upon having the repayment thereof with interest at the rate hereinafter mentioned secured in manner hereinafter appearing **Now this Indenture Witnesseth** that in pursuance of the said agreement and in consideration of the sum of £500 now paid to the Borrower by the Mortgagee (the receipt whereof is hereby acknowledged) the Borrower hereby covenants with the Mortgagee to pay to him on the 14th day of June next the sum of £500 with interest thereon in the meantime at the rate of £5 per cent. per annum from the date hereof And if the said money shall not be paid on that day then so long as any part thereof shall remain owing to pay to him interest at the rate aforesaid by equal half-yearly payments on the 14th day of June and the 14th day of December in every year. **And this Indenture Also Witnesseth** that in further pursuance of the said agreement and for the consideration aforesaid the Borrower as beneficial owner hereby demises unto the Mortgagee ALL the said hereditaments comprised in and demised by the said Indenture of Lease to hold the same unto the Mortgagee for the unexpired residue

of the term of 60 years granted by the said Lease (except the last day thereof). Subject to the proviso for redemption hereinafter contained PROVIDED ALWAYS and it is hereby agreed that if the Borrower shall on the said 14th day of June next pay to the Mortgagee the said sum of £500 with interest in accordance with the said covenant the Mortgagee shall at any time thereafter upon the request and at the cost of the Borrower surrender the mortgaged property to the Borrower or as he shall direct. AND IT IS HEREBY DECLARED that the Borrower shall henceforth stand possessed of the leasehold reversion in the property hereby mortgaged in trust for the Mortgagee subject to any equity of redemption subsisting therein under these presents and shall assign or dispose thereof as the Mortgagee shall direct. And the Borrower doth hereby irrevocably appoint the Mortgagee his attorney and attorneys in his name and on his behalf at any time to assign the said leasehold reversion to the Mortgagee or as he shall direct subject to any equity of redemption subsisting as aforesaid and to do all necessary or proper acts for that purpose. AND it is hereby expressly agreed that the statutory power of appointing new trustees of the said leasehold reversion in place of the Borrower shall be exercisable by the person or persons for the time being entitled to receive the principal moneys so secured and so that the power of appointing such new Trustee or new Trustees in the place of the Borrower shall be exercisable at any time whether or not a case for such appointment has arisen under the statute.

IN WITNESS, etc. (as in Form I.) (*c*).

SCHEDULE.

(Description of the Property.)

(*c*) For other covenants and clauses which are frequently inserted, see "Encyclopædia of Forms," vol. viii. p. 628.

## FORM IV.

### FORM OF A MARRIAGE SETTLEMENT OF REAL ESTATE.

**This Indenture** made the 15th day of January 1908 BETWEEN ARTHUR SMITH of 232 Brook Street in the County of London M.D. of the first part MARY JONES of "The Mount" Surbiton in the County of Surrey spinster of the second part and ANDREW DUNCAN of No. 90 the Albany in the County of London gentleman and the REVEREND GEORGE WHITE of the Rectory Clerkham in the County of Surrey clerk in Holy Orders (hereinafter called "the Trustees") of the third part.

WHEREAS a marriage is intended to be solemnized between the said Arthur Smith and the said Mary Jones

AND WHEREAS the said Arthur Smith is seised of or entitled to the manors and hereditaments hereinafter expressed to be hereby granted for an estate of inheritance in fee simple in possession free from incumbrances.

AND WHEREAS upon the treaty for the said intended marriage it was agreed that the said Arthur Smith should settle the said manors and other hereditaments and tenements in manner hereinafter appearing.

**Now this Indenture Witnesseth** as follows:—

1. In pursuance of the said agreement and in consideration of the said intended marriage the said Arthur Smith with the privity of the said Mary Jones and as settlor hereby grants and conveys to the

Trustees and their heirs ALL THAT the Manor of Ewbury in the County of Surrey and also ALL THOSE the freehold hereditaments lying within the said Manor and containing by admeasurement 56 a. 2 r. 32 p. or thereabouts with the mansion house or messuage thereon known as Coneyborough TO HOLD the said manor and hereditaments and all other the premises hereby granted with their appurtenances unto the Trustees and their heirs to the uses following namely: —

(1) TO THE USE of the said Arthur Smith and his heirs until the said intended marriage shall be solemnized.

(2) From and after the solemnization of the said marriage TO THE USE and intent that henceforth during the joint lives of the said Arthur Smith and Mary Jones there shall be charged upon and shall issue out of the premises hereby granted and out of the rents and profits thereof to the Trustees the yearly rent-charge of £200 sterling without deduction except for income tax and by half-yearly payments on the 24th day of June and the 25th day of December and on the first of such days which shall occur next after its determination such yearly rent-charge to be paid by the Trustees to the said Mary Jones for her separate use without power to anticipate the same.

(3) Subject to and after payment of the said yearly rent-charge and to the powers by the 44th section of the Conveyancing and Law of Property Act 1881 given for the recovery thereof, and to every (if any) term of years which may be created by virtue of such powers To the use of the said Arthur Smith and his assigns without impeachment of waste.

(4) From and after the death of the said Arthur Smith if the said Mary Jones shall survive him To the use and intent that the premises hereby granted and the income thereof shall stand charged with and that there shall issue thereout to the said

Mary Jones and her assigns during her life a yearly rent-charge (clear of all deductions except for estate duty settlement estate duty and income tax) of £800 sterling the same to be in lieu of her jointure and in bar of dower and freebench and to be paid to the said Mary Jones her executors administrators or assigns half-yearly on every 24th day of June and 25th day of December including the first of such days which shall occur next after its determination.

(5) From and after the death of the said Arthur Smith (whether the said Mary Jones shall die in the lifetime of the said Arthur Smith or shall survive him but if she shall survive him subject to the said yearly rent-charge of £800 and to the powers by the 44th section of the Conveyancing and Law of Property Act 1881 given for the recovery thereof and to every or any term of years which may be created by virtue thereof) To THE USE OF the Trustees during the term of 500 years next following the death of the said Arthur Smith without impeachment of waste UPON THE TRUSTS and subject to the provisoes agreements and declarations hereinafter in clauses 3 and 4 hereof expressed concerning the same term.

(6) From and after the determination of the said term of 500 years and in the meantime subject thereto and to the trusts thereof To THE USE of the first and all other sons of the said intended marriage successively according to seniority in tail male.

(7) In default of such issue as aforesaid To THE USE of the first and all other sons of the said intended marriage successively according to seniority in tail.

(8) In default of such issue as aforesaid To THE USE of the daughter (if only one) of the said intended marriage in tail. But if there shall be more than one such daughter then To THE USE of all the daughters of the said intended marriage as tenants in common in tail in equal shares.

(9) If there shall be a failure of issue of the body or

bodies of any one or more of such daughters as aforesaid then as to the share or shares as well surviving or accruing as original of any such daughter or daughters whose issue shall so fail as aforesaid To THE USE of the others if there be more than one other of the said daughters equally as tenants in common in tail.

(10) If all except one of the daughters of the said intended marriage shall die without issue then as to the whole of the premises To THE USE of that one daughter in tail.

(11) In default of such issue as aforesaid. To THE USE of the said Arthur Smith his heirs and assigns for ever.

2. PROVIDED ALWAYS that the Trustees shall not at any time be bound (although they shall be at liberty) to require payment of or to receive the said yearly rent-charge of £200 or any part thereof unless they shall have been requested in writing by the said Mary Jones to receive the said rent-charge or that part thereof. And that the Trustees shall not be liable to answer for the consequences of any neglect to receive any arrears of the said yearly rent-charge of £200 unless within three calendar months next following the date at which such arrears as aforesaid become payable the said Mary Jones shall have in writing requested the Trustees to receive those arrears. And that all arrears of the said rent-charge which neither the Trustees shall have received nor the said Mary Jones shall in manner aforesaid have requested the Trustees to receive shall merge in the inheritance of the said hereditaments so charged with the payment of the said rent-charge as aforesaid.

3. The premises hereby granted are hereinbefore limited to the use of the Trustees for the said term of five hundred years Upon Trust that if there shall be any child or children of the said intended marriage who shall attain the age of twenty-one years or being a daughter or daughters shall marry under that age

(other than and except any and every child who before or when he or she shall attain the age of 21 years or being a daughter shall marry under that age shall be hereby entitled indefeasibly subject to the said term of 500 years and subject to the said yearly rent-charge of £800 if still subsisting to the premises hereby granted or to an undivided part thereof either in possession or in remainder immediately expectant on the determination of the said estate for life of the said Arthur Smith) which child and children (other than and except as aforesaid) are hereinafter called "portionist" and "portionists" respectively. Then subject to the provisoes hereinafter contained the Trustees shall at the time or times and by one or more of the means hereinafter specified raise for the portion or portions of any portionist or portionists such a sum of money (clear of all charges except estate duty and settlement estate duty) as is hereinafter mentioned (that is to say) if there shall be but one portionist the sum of £5000 if there shall be two portionists and no more the sum of £7000 if there shall be three portionists and no more the sum of £9000 and if there shall be four or more portionists the sum of £10,000.

And subject to and without derogating from the estate for life of the said Arthur Smith except with his consent in writing the Trustees shall be interested in and stand possessed of the sum which shall so become raiseable for portions or a portion as aforesaid (hereinafter called "the portions fund") Upon the trusts hereinafter expressed (that is to say)

(1) In trust for all or such one or more exclusively of the others or other of the portionists and the issue of a portionist or of the portionists if more than one in such shares and whether for one or more at such time or times for such interest or interests (which interest or interests as well in the quantity as the quality thereof respectively may be made partially or wholly dependent on the discretion of the Trustees or of any other persons or person who

shall be designated or made ascertainable for the purpose by any appointment or appointments creating that interest or those interests) and in all respects whatsoever in such manner as the said Arthur Smith and Mary Jones *shall by deed* with or without power of revocation and new appointment at any time or times without transgressing the rule against perpetuities *appoint* and in default of and subject to any and every such joint appointment as aforesaid as the survivor of the said Arthur Smith and Mary Jones by deed with or without power of revocation and new appointment or by will or codicil shall at any time or times without transgressing the rule against perpetuities appoint.

(2) In default of and subject to any and every such appointment as aforesaid IN TRUST FOR the portionist or all the portionists and if there be more than one in equal shares.

4. Provided always and it is hereby agreed and declared as follows :—

(1) No portionist to whom or to whose issue any part of the portions fund may have been appointed in exercise of the aforesaid power for that purpose shall in default of appointment to the contrary have or be entitled to any share of the unappointed part of the portions fund without bringing the part or parts so appointed to him or her or to his or her issue as aforesaid into *hotchpot* and accounting for the same accordingly.

(2) The Trustees shall raise the portions fund or so much thereof as shall not in exercise of the power in that behalf hereinafter contained have been previously raised so soon as may be after the said Arthur Smith shall have died and the child or children for payment of whose portion or portions the same may be needed shall have become a portionist or portionists respectively.

(3) The Trustees shall raise such money as they

shall need or shall be hereby authorised to raise for a portion or portions or for a part or parts of a portion or portions with interest thereon at the rate of £4 per cent. per annum from the date when the same shall become raiseable by mortgage for all or any part of the said term of 500 years of all or any of the premises hereby granted or by sale of timber or minerals or by and out of the rents profits and income of and from all or any of the premises hereby granted or by all or any of the means aforesaid or by any other reasonable means and every such mortgage may contain all such provisions as the lender or lenders may require and the Trustees may think it expedient to allow and no such person or persons of whom the Trustees shall borrow any money purporting to borrow the same in exercise of the power to raise money by mortgage herein contained shall be bound to inquire whether the money so borrowed be needed or authorised to be borrowed or to see to the application or be responsible for the non-application or misapplication thereof.

(4) The Trustees shall after the death of the said Arthur Smith and if and while there shall be any children or child of the said intended marriage who shall be for the time being entitled (though only presumptively) to portions or a portion and if the Trustees shall think fit so to do by and out of the rents and profits of the premises comprised in the said term or any part thereof raise for the *maintenance* and education or maintenance or education of every or any child who may become a portionist such a yearly sum as the Trustees shall think proper and as shall not exceed two per cent. per annum if and while that child shall be under the age of twelve years and three per cent. per annum if and while such child shall be over the age of twelve years and under the age of twenty-one years and if female a spinster on the possible portion of that possible portionist or (if any part of that possible portion shall then have already been raised) on

the then unraised part thereof but clear of all charges except estate duty and settlement estate duty and income tax and shall apply the same for such maintenance or education as aforesaid in such manner in all respects as they shall think fit and they may either themselves so apply the same or may pay the same to the guardian or guardians of such possible portionist as last aforesaid or to any other person or persons for the purpose aforesaid.

(5) The trustees may after the death of the said Arthur Smith or in his lifetime at his request in writing by the ways and means aforesaid or any of them raise any sum or sums of money not exceeding altogether one-half of the then expectant or presumptive portion under the trusts aforesaid of any son who may become a portionist and pay or apply the money so to be raised for the *advancement* or benefit of that possible portionist as the said Arthur Smith during his life and after his death as the Trustees shall think fit. PROVIDED ALWAYS that in any and every case in which an advance shall be made in exercise of the power hereinbefore last contained that advance shall if the child advanced shall live to become entitled to a portion be treated as part of that portion but if that child shall die without becoming entitled to a portion then if the death of that child shall not lessen the sum hereby directed to be raised for portions, the sum advanced shall be treated as a part of that directed to be raised for portions but if the death of that child shall lessen the sum directed to be raised for portions the sum advanced shall be treated as a charge on the estate in addition to the lessened sum which shall have become raiseable for portions.

(6) The Trustees may at any time or times before any portion or part of a portion for payment whereof respectively money may be likely to be thereafter needed shall be required (but during the life of the said Arthur Smith only with his consent in writing)

raise the whole or any part or parts of the portions fund although it may not then be certain whether all or any of the money so raised may eventually be required.

5. Subject to the trusts hereinbefore contained and to the rights of the Trustees respectively and of the executors or administrators of them respectively by any of the ways or means whereby the Trustees are hereinbefore authorised to raise money for portions to raise and reimburse themselves or himself all costs and expenses incurred in relation to the trusts aforesaid the Trustees shall permit the person or persons who may for the time being be entitled to the remainder or reversion of the hereditaments comprised in the said term of 500 years expectant on the determination thereof to receive for his and their own use and benefit so much of the same rents and profits as shall from time to time remain after answering the trusts aforesaid.

(Here would follow clauses giving power to appoint new trustees and making the trustees trustees for the purposes of the Settled Land Acts, etc., for which see "Encyclopædia of Forms," vol. 13, p. 306 *et seq.*)

Real Property is frequently settled as personalty. In such a case it is conveyed to trustees on trust for sale, and the proceeds of sale are settled upon the husband, wife and issue. The trustees have power to postpone the sale, and in the meantime to apply the rents and profits in the same way as the income of the proceeds of sale.

For a form of such a settlement, see "Encyclopædia of Forms," vol. 13, p. 496 *et seq.*

# TEST QUESTIONS

## NOTE.

These questions have been drawn up with a view to assisting students in mastering the principles of the Law of Real Property, and in testing their knowledge of that subject by reference to the pages of the present work. They are not, therefore, necessarily such questions as it would be fair to set in an examination, though most of them would probably be suitable for that purpose.

# TEST QUESTIONS.

## CHAPTER I.

1. Give some account of the feudal system.

2. What is the meaning of the word *heir?* How does the heir differ from the devisee?

3. Upon whom do (*a*) land, (*b*) chattels, devolve in the first place upon a man's death?

4. What is the effect of a grant of land, (1) "to A," (2) "to A and his heirs," (3) "To A and the heirs of his body"?

5. How do you distinguish between real property and personal property?

6. What is the legal meaning of acquiring lands *by purchase?*

7. In what senses is the term "common law" used?

8. Explain the terms—tenants in capite, estate, fee, enfeoffment, freehold, chattels, real, seisin.

## CHAPTER II.

1. What various estates in land now exist?

2. How did freehold tenure differ from villein tenure under the feudal system?

3. What is villein tenure called at the present day? Classify the forms of freehold estates existing under William the Conqueror.

4. What estates now come under the heading "freehold"?

## CHAPTER III.

1. What led to the passing of the Statute *Quia Emptores*, and what was its effect?

2. What forms of socage tenure remain to-day?

3. State the services due from a tenant to the lord of the seignory, (*a*) at the time of William I., (*b*) at the present day.

4. What are the distinguishing features of, (*a*) gavel-kind tenure, (*b*) Borough English ?

5. What were the services due to the lord from a tenant in knight service ?

6. Explain grand sergeanty, petty sergeanty, scutage, frankalmoign.

## CHAPTER IV.

1. Trace the steps by which a tenant in fee-simple acquired the rights of alienation, (*a*) *inter vivos*, (*b*) by will. Are there now any exceptions to this right ?

2. How far can corporations hold lands ?

3. What is the effect of a conveyance of land for charitable purposes, (*a*) by deed, (*b*) by will ? What formalities must be complied with in each case ?

4. What words would be necessary to convey land to a person in fee-simple, (*a*) before 1881, (*b*) after 1881 ?

5. Explain the meaning of the maxim "a corporation never dies" ; also of the terms—corporation sole, corporation aggregate, mortmain.

## CHAPTER V.

1. What was the effect of a gift of land to A and the heirs of his body, (*a*) before, (*b*) after the Statute *De donis conditionalibus ?*

2. Explain the object and procedure of a common recovery. In what respects did it differ from a fine ? By what Statute were they both abolished ?

3. How may an entail now be barred ?

4. Who is "the protector of a settlement" ? When does a tenant in tail require his consent to bar the entail, and what effect has a deed executed without his consent ?

5. Give the outlines of a modern settlement of land.

6. Explain the terms—reversioner, tenant to the præcipe, tail special, tail general, base fee, tenant in tail after possibility of issue extinct.

## CHAPTER VI.

1. What is the present effect of a grant of land to X, (*a*) in a will, (*b*) in a deed ?

2. What powers has a tenant for life, (*a*) to commit waste, (*b*) to alienate the land which he holds ?

3. To what extent can a tenant for life, (*a*) make leases, (*b*) do repairs, either at Common Law or under the Settled Land Acts ?

4. Can a tenant for life cut and sell timber, (*a*) when impeachable, (*b*) when unimpeachable, for waste ?

5. Give the leading features of a tenancy *pur autre vie*. Who was the "general occupant" in this connection, and by what Statutes was "general occupancy" abolished ?

6. Explain—voluntary waste, permissive waste, heirlooms, salvage, trustees for the purpose of the Settled Land Acts.

## CHAPTER VII.

1. Distinguish joint tenancy and tenancy in common: in favour of which does equity lean ? What is meant by the "four unities of joint tenancy" ?

2. What is the effect of a grant of land to A and B and the heirs of their bodies ?

3. How can a joint tenancy be severed ?

4. What is meant by the right of a joint tenant to a partition ? What powers are given to the Court under the Partition Act, 1868, to decree a sale instead of a partition ?

## CHAPTER VIII.

1. What were the old forms of action to recover (*a*) the property in land, (*b*) the possession of land ?

2. Explain the Assize of novel disseisin, and the Assize of mort d'ancestor.

3. Show by what steps leaseholders acquired the right to recover possession, and how freeholders adopted the same remedies ?

4. What forms of relief are now open to a claimant to land ?

## CHAPTER IX.

1. For what reasons did "trusts" originally come into existence? And how did the Court of Chancery enforce them?

2. Give instances showing how trusts were created, (*a*) to convey lands into mortmain, (*b*) to bar dower.

3. Why was the Statute of Uses passed, and what were its provisions?

4. Did the Statute of Uses apply where land was granted, (1) to B for 103 years, to the use of A for life; (2) to B for life, in trust for A for 100 years; (3) unto A to the use of A; (4) to A and his heirs, to the use of Cambridge University; (5) to Cambridge University, to the use of A and his heirs; (6) to B to the use that he shall collect the rents and profits and pay them to A? State in each case who takes the legal estate.

5. What was the decision in Jane Tyrrel's case, and how did it affect the Statute of Uses?

6. How far are equitable estates governed by the same rules as legal estates?

7. Upon whom does the estate of a trustee now devolve, (1) if he has co-trustees, (2) if he is a sole trustee?

8. Under what circumstances can trustees retire from a trust, and by whom can new trustees be appointed?

9. Distinguish, with examples, a resulting trust, an implied trust, and a constructive trust.

## CHAPTER X.

1. Explain the old method of conveying to another, (1) Corporeal hereditaments, (2) Incorporeal hereditaments.

2. What was the object and the method of a "Lease and release"? How was it affected by the Statute of Enrolments, and how did it come to be revived again after the passing of the Statute of Uses?

3. How far and by what Statute is it provided that grants of land should be in writing?

4. By what steps in the last century were the "lease and release" done away with?

5. In what ways has the Conveyancing Act, 1881, simplified a modern conveyance of land ?

6. By what words of limitation is freehold land conveyed to a corporation ?

7. Explain the terms—livery in deed, livery at law, indenture, deed poll, escrow.

## CHAPTER XI.

1. What change in the vesting of real property upon death was effected by the Land Transfer Act, 1897 ?

2. Does this Act apply to (1) copyhold land, (2) land held on a joint tenancy ?

3. What must now be done in order to transfer the legal estate to the persons entitled, (*a*) if a tenant in fee-simple dies intestate, (*b*) if he devised it to A ?

4. Explain the terms—real representative, personal representative, executor's assent.

## CHAPTER XII.

1. On the death of a tenant in fee-simple, intestate, from whom is the inheritance traced ?

2. X's eldest son dies leaving a daughter Y. X has also a younger son Z : who inherits X's freeholds upon X's death ?

3. What is the nature of the estate of "co-parceners" ? how does it differ from joint tenancy ?

4. A lives in a freehold house in the country, which he has bought : he dies intestate and childless, leaving a brother, his mother, and his father's father still alive ; who takes the house, and by what rules of descent ?

5. Under what conditions do relations of the half-blood inherit ?

6. To whom does the freehold go in the absence of male paternal relations ?

7. Summarize the changes effected by the Real Property Inheritance Act, 1833, as compared with the old law.

8. In what case is the inheritance traced from the person last entitled instead of the last purchaser ?

9. What are the widow's rights to real property upon the death of her husband intestate? What are the provisions of the Intestates' Estates Act, 1890?

10. A dies intestate, leaving a mother, half-brother, sister, and two nephews (children of a deceased brother): how will his personal property be divided among them?

## CHAPTER XIII.

1. What formalities must now be complied with in order to make a valid will of lands?

2. How may a will be revoked? A testator wrote across his will "This is revoked," and threw it away: after his death it was found; is the will valid?

3. What would be the effect of a devisee being a witness to a will, (*a*) before, (*b*) after 1837?

4. A devises lands to B and the heirs of his body. B dies before A: what happens to the devise?

5. What exceptions are there to the rule that a gift by will to a child of the testator does not lapse although the child die first, provided the child leaves issue surviving the testator?

6. How did the Wills Act, 1837, affect a devise by a testator, (*a*) of "all my land" to A, (*b*) of land "to A, but if he die without issue, to B"? What further construction has now been put upon (*b*) by the Conveyancing Act, 1882?

7. What is the rule of construction which gives a life estate by implication to a person to whom nothing is expressly given by the will?

## CHAPTER XIV.

1. Under what circumstances can a creditor seize his debtor's lands?

2. Give the history of the writ of elegit and describe the procedure under it.

3. What statutes require the registration of the writ of elegit and what is the effect of non-registration?

4. What property can be seized under a writ of elegit and how far does it affect lands held in tail?

5. What powers has a creditor over land which the tenant has mortgaged and charged in his favour?

6. When can (*a*) a "voluntary," (*b*) a "fraudulent" conveyance of land by a debtor be set aside in the interests of creditors?

7. Explain the terms—receiver, receiver by way of equitable execution, estate by elegit, return to the writ.

## CHAPTER XV.

1. What is the effect upon a conveyance if it is shown that one of the parties to it was a lunatic at the time that he executed it?

2. How can the lands of a lunatic be effectively conveyed at law?

3. What powers has an infant to convey lands belonging to him either at Common Law or by Statute?

## CHAPTER XVI.

1. How did the maxim "husband and wife are one in law" before 1882 affect a woman's rights upon her marriage over (*a*) her freeholds, (*b*) her leaseholds, (*c*) her personalty?

2. How did (*a*) equity, (*b*) statute law, modify the effect of the common law rules in the last question?

3. How could a married woman convey her lands before 1882, and how since?

4. What is meant by a "restraint upon anticipation"? When is it removed? When does it revive upon remarriage? How does the Act of 1882 affect it?

5. What recent statute has dealt with the rights of a married woman to convey lands of which she was trustee?

6. What would be the rights of a husband to the property of his wife upon her death, (*a*) before 1882, (*β*) after 1882?

7. Explain the meaning and nature of an estate by curtesy: under what circumstances would such an estate now arise?

8. What provisions had to be fulfilled at Common Law if a widow was to be entitled to "dower" in her husband's lands?

9. How was the widow's right to dower defeated, (*a*) at equity, (*b*) by statute? Give the main provisions of the Dower Act, 1833.

10. What is the present effect of a gift of property, (*a*) "to my sister and her husband as joint tenants," (*b*) "to my sister, her husband, and A. B. in equal shares"?

11. Explain "tenancy by entireties."

## CHAPTER XVII.

1. Give the rule against perpetuities.

2. What is the effect of a gift, (*a*) by will to S for life and after his death to his first son who should reach 21, (*b*) by deed to S for life and after his death to his first son who should reach 25, (*c*) on trust to D for life and after his death to the first of his issue who should reach 21, (*d*) by deed to A and the heirs of his body with remainder to B in fee-simple ?

3. What are the exceptions to the rule against perpetuities ? Explain the *cy-près* doctrine and its application in connection with this rule.

## CHAPTER XVIII.

1. What limits are placed by statute upon the accumulation of income ?

2. How long may income be directed to be accumulated for the purchase of land ?

3. Are there any cases in which the above limits may be exceeded ?

4. If a testator gives a direction to accumulate which exceeds the prescribed limits, is any effect given to it ? How does the rule against accumulation differ in this respect from the rule against perpetuities ?

## CHAPTER XIX.

1. Distinguish a reversion and a remainder.

2. How does a vested remainder differ from a contingent remainder ?

3. What is an executory interest, and how may it be created ? Give instances.

4. How may future estates of all kinds now be transferred ?

5. What estate (if any) is taken by C in the following cases : (*a*) grant of fee-simple by C to B for life, (*b*) grant by A of fee-simple to B for life, and after his death to C, (*c*) grant of fee-simple to A and his heirs to the use of B and his heirs until the marriage of C, and then to C and his heirs ?

## CHAPTER XX.

1. What rights belong to the reversioner which do not belong to the remainderman ?

2. Explain the terms—particular estate, distress, attornment.

## CHAPTER XXI.

1. Explain the meaning of "merger." When can it take place ?

2. What is the rule in Shelley's case ?

3. Land is granted, (*a*) "to A for life, remainder to B for life, remainder to the heirs of A"; (*b*) "to A for 50 years, if he shall so long live, with remainder to the heirs of A"; (*c*) "to B for life with remainder to the heirs of A." What estate does A take in each case ?

4. Distinguish "executory trust" and "executory interest": does the rule in Shelley's case apply to either of them ?

## CHAPTER XXII.

1. What rules at Common Law were applicable to contingent remainders ?

2. How has Statute Law modified these rules ?

3. To what extent does the rule against perpetuities affect contingent remainders ?

4. What is the effect of the following grants: (*a*) to A for life with remainder to the first son of A who shall reach 35; (*b*) to A for life with remainder to the first son of A who shall reach 21; (*c*) to A for life (a bachelor), remainder to his eldest son for life, with remainder to the eldest son of A's eldest son; (*d*) to A for life, remainder to his first son who should reach 21, remainder to B in fee-simple ?

## CHAPTER XXIII.

1. Trace the growth of executory interests up to the present day.

2. Distinguish Common Law powers, powers under the Statute of Uses and equitable powers.

3. When is a power said to be "collateral," and when to be

"appendant"? What is the meaning of a power (*a*) "collateral and in gross," (*b*) "appendant and in gross"?

4. Explain (*a*) a general, (*b*) a special power of appointment; how is each affected by the rule against Perpetuities?

5. Under what circumstances can an appointment be set aside, (*a*) as a fraud on a power, (*β*) on the ground that the power has been defectively exercised?

6. A has power to appoint by deed. He appoints by will. Will the appointment be enforced? Would your answer be the same if A had power to appoint by will and he appointed by deed?

## CHAPTER XXIV.

1. What methods were resorted to before 1790 to bar dower? What was the objection to each?

2. What method was introduced by Fearne? Why is it now unnecessary to take these precautions?

## CHAPTER XXV.

1. Give instances of incorporeal hereditaments: what is the difference between rights appendant, appurtenant, and in gross?

2. Explain "rent service," "rent charge," "quit rent," "rent seck": what powers has a landlord to-day if his rent is not paid?

3. Give instances of easements: how can they be acquired? Must they be expressly mentioned now in a conveyance of land?

4. How can easements be destroyed?

5. Give briefly the provisions of the law relating to advowsons.

6. What is "tithe": how can its payment be enforced?

## CHAPTER XXVI.

1. Give a brief history of copyhold tenure from early times.

2. How is an estate in copyhold transferred, and what services are due from the new tenant?

3. What is the effect of a gift of copyhold lands, (*a*) to A and his heirs, (*b*) to A and the heirs of his body?

4. When can copyhold be enfranchised, (*a*) at common law, (*b*) by statute: how do the two methods differ in effect?

5. As a general rule copyholds pass on the death of the tenant in the same way as freeholds: what exceptions are there to this rule?

6. How does a contingent remainder of copyhold differ from a contingent remainder of freeholds? Does the Contingent Remainders Act, 1877, apply to the former?

7. Explain—customary freehold, customary heir, heriot, freebench.

## CHAPTER XXVII.

1. What is a tenancy from year to year, and what notice is necessary to terminate it?

2. How far is (*a*) writing, (*b*) writing under seal, necessary for the creation of a lease, and how far desirable? What is the doctrine as to this in *Walsh* v. *Lonsdale?*

3. In what ways may a lease be determined?

4. When will the Court grant relief against forfeiture to a tenant who has committed a breach of a covenant in a lease, (*a*) to pay rent, (*b*) not to sublet or assign the lease, (*c*) against the bankruptcy of the tenant, (*d*) in any other case?

5. How does an assignment by a tenant of his lease differ in its effect from a sub-lease?

6. What classes of covenants by lessors and lessees "run with the land" at common law and in equity so as to bind the assigns of the covenantor? Is an assignee bound by a covenant by the lessee, (*a*) not to carry on a certain business on the premises, (*b*) to build a wall on the premises, (*c*) to repair?

7. How can the personal representatives of a deceased tenant avoid liability to perform the covenants of the lease?

8. What is the usual object of creating "long terms of years," and how were they dealt with by the Satisfied Terms Act, 1845?

9. When was a term assigned in trust to attend the inheritance? Is this necessary now?

10. Under what circumstances can a tenant under a long term of years change it into a fee-simple?

11. Explain the terms—tenancy by sufferance, tenancy at will, proviso for cesser, privity of estate, interesse termini.

## CHAPTER XXVIII.

1. How can chattels be settled so as to descend in the same way as freehold land? What would be the effect of a grant of leasehold lands to A for life, remainder to his first and other sons in tail?

2. Explain the rule "quicquid plantatur solo, solo cedit": how far does the rule apply on the death of the tenant for life, (*a*) as between the heir and the next of kin, (*b*) as between his executors and the remainderman entitled to the land?

3. What exceptions have grown up by custom or statute to the rule that as between landlord and tenant all fixtures belong to the landlord?

## CHAPTER XXIX.

1. How did common law and equity formerly differ in their treatment of a mortgage, and which rule prevails now?

2. Give in outline the form of an ordinary mortgage deed.

3. What rights has a mortgagee against a mortgagor, (*a*) to sell, (*b*) to appoint a receiver over the mortgaged property? Under what circumstances can he exercise these rights? Is the leave of the Court necessary in either case?

4. What is the mortgagee's right of "foreclosure"? What is meant by reopening foreclosure?

5. How is the maxim "once a mortgage always a mortgage" applied? In what ways can the rights of the mortgagor to redeem be put an end to despite this maxim?

6. What powers has a mortgagor to lease the mortgaged property?

7. To whom do the estates of the mortgagor and mortgagee respectively descend on death? How has the law been altered in this respect?

8. In what ways can an equitable mortgage be created? What rights has an equitable mortgagee (*a*) if the mortgage is by deed, (*b*) if it is not?

9. What is meant by "tacking" as applied to mortgages, and how does the equitable doctrine of "notice" apply to it?

10. Distinguish "tacking" from "consolidating" mortgages. Can the right to consolidate still be reserved in spite of the Conveyancing Act, 1881, and if so, how?

11. How would you mortgage leasehold property? Explain the advantages of your method.

12. In what way can copyhold land be mortgaged?

13. Explain the terms—joint account clause, contributory mortgage, sub-mortgage, constructive notice.

## CHAPTER XXX.

1. In what length of time will a person acquire a title to land by possession, (*a*) as against the true owner, (*b*) as against all others? How does the case of land differ from personalty?

2. What allowance is made by statute, protecting the true owner's rights against wrongful possession, if he is under a disability?

3. Land is granted to X for life, remainder to A in fee-simple; within what period must A bring his action for wrongful possession against C, (*a*) if C takes possession on the death of X, (*b*) if C takes possession nine years before the death of X?

4. How can a "base fee" be enlarged into a fee-simple by lapse of time?

5. What else besides disability will prevent the Statute of Limitations from running against the true owner?

## CHAPTER XXXI.

1. Distinguish limitation and prescription. On what rule is the latter founded, and what two kinds of prescription are there?

2. How could a prescriptive right be defeated, (*a*) before 1832, (*b*) since 1832?

3. What user will entitle A to an absolute right (*a*) to quarry stone on B's land, (*b*) to walk over B's land, (*c*) to prevent B from obstructing the light to his windows? Will any disability on the part of B to sue be taken into consideration?

4. What amount of light is A in the above case (3 *c*) entitled to at the end of 20 years?

5. What special rights has a reversioner in the case of a way or a watercourse even though the prescribed period has expired?

6. Can the above rights once acquired be lost by non-user? If so, to what extent must non-user be shown?

## CHAPTER XXXII.

1. What is necessary to constitute a valid contract for the sale of land?

2. What is an "open contract" for the sale of land, and what length of title must the vendor show in the case of a sale under such a contract, ($\alpha$) of freeholds, ($\beta$) of copyholds, ($\gamma$) of leaseholds?

3. What rights has the buyer of land against the seller if the contract falls through, ($a$) owing to the seller's refusal to complete, ($b$) owing to a defect in the title?

4. Is the seller under any circumstances entitled to retain the title deeds. If so, what rights has the buyer to demand production of them?

5. What is the rule as between buyer and seller as to proof of the contents of documents 20 years old?

6. What are the rights as between buyer and seller from the date of the contract to the completion of the conveyance?

## CHAPTER XXXIII.

1. What covenants are implied where a person conveys land "as beneficial owner," ($a$) on a sale of freehold, ($b$) on a sale of leasehold, ($c$) on a mortgage of freehold, ($d$) on a mortgage of leasehold?

2. What covenants are implied where a person conveys, ($\alpha$) as settlor, ($\beta$) as trustee?

## CHAPTER XXXIV.

1. What claims against land are required to be registered under the Land Charges Act, 1900? What is the effect of non-registration?

2. What provisions for registration are made by the Yorkshire Registry Act and the Middlesex Registry Act? How do they differ in the results of non-registration?

3. What registers are kept under the Land Transfer Act, 1897 ? How far is registration of title compulsory in the County of London ?

4. How does an absolute title under the Land Transfer Act, 1897, differ from a possessory title ? What must be shown by a person claiming to be registered with a possessory title ?

## CHAPTER XXXV.

1. What forms of duty are now payable on the death of any person entitled to property ?

2. What is succession duty ? When is the claim to it barred by lapse of time ?

3. What exemptions are there, (α) from succession duty, (β) from estate duty ?

4. What is settlement estate duty and when is it payable ? What persons are exempt from it ?

5. Why is the question whether the proper duties have been paid important to a purchaser of land ?

# INDEX.


Absolute title, registration of, 291, 292
Abstract of Title, 260
    form of, 277–279
Accumulations, rule as to, 140, 303
    exceptions to the rule, 141
    effect of exceeding the rule, 142
Action of Ejectment, 57, 58
        to recover land, 56
Advowsons,
    sale of, 180
    presentative and donative, 181
    agreements to resign, 181
    length of title in case of, 263
Agricultural Fixtures, 220
Aids, 15
Alienation, history of right of, 20.
Ancestors, inheritance of, 86–88
Annuities, Registration of, 288
Appendant, Incorporeal hereditaments, 174
Appurtenant, Incorporeal hereditaments, 175
Assignment of leaseholds, 204
Attornment, 148
Auction Sale, auctioneer is agent of both parties, 274
            when contract complete, 274

Bankruptcy, 112–116
    effect on estate-tail, 114
    fraudulent conveyances, 115
    general power, effect of, 114
    property which vests in trustee, 114
    registration of, 288
    voluntary conveyances, 114
Bargain and Sale, enrolment of, 75
Barring an entail, 33
Base fee, 34
    enlargement of a, 250
Beneficial Owner, covenants, 284, 285, 311, 312
*Bonâ-fide* purchaser without notice, 68

Borough English, 17
Boundaries, 78
Building Lease, 44

Cautions, registration of, 291
Chancery, enforcement of uses by, 60
Charities, conveyance of land to, 24
Chattel real, meaning of, 6
Chattels, settlement of, as heirlooms, 217
Common, 173
  Law, meaning of, 8
Compensation to Tenants, 201
  under Agricultural Holdings Act, 1908...220
Completion of contract for sale, 267
Compulsory registration, 290, 293
Concealed fraud as affecting limitation, 251
Conditional Fee, 28
Conditions of sale, form of, 269–273
Consolidation of mortgages, 241, 242
  as against other mortgagee, 243
Constructive notice, 69
    trust, 71
Contingent Remainders, 144, 145, 152–160
  Act of 1877...159
  failure by merger, 157, 308
    of, by determination of the particular estate, 157, 158, 310
  of copyholds, 192
  rule against perpetuities, 155
  statute law as to, 157
Contract for sale
  of land, 257
  completion of, 267
  form of, 276
Contributory Mortgage, 236
Conveyance,
  execution of, 265
  form of, 280, 281
    at Common Law, 73
  of registered land, 294
Convicts, conveyances by, 120
Co-parceners, 86
Copyholds,
  contingent remainders of, 192
  curtesy in, 191

Copyholds—*continued.*
death of tenant, 190
trustee of, 191
descent of, 93
dower in, 191
enfranchisement of, 188
escheat in, 185
estates tail in, 187
fee simple in, 184
fines in, 185
heriots in, 186
history of, 183
Land Transfer Act does not apply to, 82, 293
length of title in case of, 262
Mines, 185
mortgages of, 245
services in, 183, 185
surrender and admittance, 184
timber, 185
transfer of, 184
Corporations,
aggregate, 26
conveyances to, 22
sole, 26
Corporeal Hereditament, 7, 73
grant by deed of, 77, 308
Covenant in mortgage, 225
not to assign a lease, 215
Covenants,
as trustee, 286
as settlor, 286
beneficial owner, 284
binding in equity, 206, 207
for title, 283, 311, 312
implied in a lease, 215, 216, 284, 312
a mortage of leaseholds, 285, 313, 314
liability of assignor, 203
negative, 206
on severance of reversion, 207
positive, 207
which run with the land, 204
on assignment of a lease, 204
a reversion, 205
Crown Debts, 109, 287
Curtesy, 126–128

Curtesy—*continued.*
in copyholds, 191
*Cy Près* doctrine relating to perpetuities, 138, 139

Death of mortgagee, 234, 318
mortgagor, 234
Death Duties, 296
Debt, alienation for, 109–118
Debts,
judgment, 110
liability of land on death of tenant, 116
secured, 112
specialty, 117, 118
Deed, corporeal hereditaments can be conveyed by, 77, 308
Deed Poll, 74
Deeds descend as land, 218
deposit of, 238
seller must hand over, 265
which the seller need not hand over, 265, 266
Deposit, 273
of title deeds, 237
Disabilities as to Limitation, 248. 249
Distress for rent, 148
Dower, 130, 131, 306
avoided by means of a use, 62
declaration to bar, 131
in Copyholds, 191
jointure to bar, 130
uses to bar, 170–172
Drunken persons, conveyances by, 120

Easements, abandonment of, 179, 256
grant of, 177
implied grant of, 177, 178
merger of, 179
prescription of, 179
Ejectment, Action of, 57, 58
Elegit, writ of, 110
applies to estate tail, 111
Emblements, 39
Enfranchisement of Copyholds, 188, 189
Enlargement of a base fee, 250
long term, 319
Enrolment of Bargain and Sale, 75
Entail. *See* Estate Tail.
Equitable Assets, 117

Equitable estates,
before the Statute of Uses, 60
creation of, 67
escheat of, 68
since Statute of Uses, 65
Equitable mortgage, 237, 238
Escheat, 15
in Copyholds, 185
Escrow, 74
Estate Duty, 298, 299
Estate, meaning of, 4
Estate Tail,
female, 35
how barred, 33
how created, 27
in Copyholds, 184
male, 35
special, 35
writ of elegit applies to, 111
Estoppel, Lease by, 197, 198
Exchange, Tenant for life, power to, 43
Executory
devise, 146, 162
Interest, 161, 162
conveyance of, 146
Trust, 152, 153

Fee Simple, conditional, 28
mode of granting, 25
Feoffment, 73
meaning of, 4
Feudal System, 2
*Fieri Facias*, writ of, 110
Fines, 31, 32
in Copyholds, 185
Fixtures, 218
at Common Law, 219
Agricultural, 220
Foreclosure of mortgages, 227
Forfeiture of Freehold, 15
of Lease, 199
form of, proviso for, 216
restrictions on right of, 201, 316
Form of
abstract of title, 277–279

Form of—*continued.*
conditions of sale, 269–273
contract for sale, 276
conveyance, 280, 281
hotchpot clause, 336
mortgage, 222
requisitions on title, 279, 280
Fraud on Powers of appointment, 168
Fraudulent conveyances, 115
Freehold, definition of, 9, 10
Freeholds, length of title in case of, 261, 262
Future estates, classification of, 144, 145

Gavelkind Tenure, 16
General Occupant, 49
power, effect of Bankruptcy, 114
words, 78
Grand Sergeanty, 18
Grant, by deed of Corporeal Hereditaments, 308
effect of, 78

Half blood, Inheritance of, 87–89
succession to leaseholds of, 95
Hedge and ditch, 78
Heir apparent, 3
presumptive, 3
Heirlooms, 217
Hereditaments, corporeal, 7
incorporeal, 8
Heriots in Copyholds, 186
Holograph will, 97
Hotchpot Clause, form of, 336
Husband,
chattels vest in, 123
leaseholds, rights over, 123
rights of, 122–125
Husband and wife, gift to, and others, 133
joint estate given to, 133

Identity, proof of, 274
Implied Trust, 71
Improvements by lessee, 201
tenant for life, 45
Incapacities as affecting prescription, 304
Incorporeal Hereditaments, 8

Incorporeal Hereditaments—*continued.*
appendant, 174
appurtenant, 174, 175
conveyance of, 73, 74
in gross, 174
nature of, 173
Indenture, 74
Infants, conveyances of, 120
Inheritance,
ancestors of, 86, 87, 88
changes by the Act of 1833...89
issue, represent their ancestor, 85
males preferred to females, 85
of half blood, 87
of mother, 88
rules of, 84–92
Inhibitions, Registration of, 291
Insure, covenant in a lease to, 214, 215
*Interesse termini*, 197
Intestacy, rules of descent, 84–95
Intestate succession (*and see* Inheritance)
to leaseholds, 93–95
brothers and sisters, 94
father, 94
Issue, gift over on death without, 106
represent their ancestor for inheritance, 85

Joint Estate, given to Husband and Wife, 133
tenancy in tail, 53
nature of, 51
partition of, 54
severance of, 53
the four unities, 52
Jointure to bar dower, 130
Judgment debts, 110
registration of, 111

Land charges, registration of, 288
Landlord's property tax, 214
Lapse, 100–102
Last Purchaser, descent traced from, 85
if no heirs of, 90
Lease,
building, 44
by estoppel, 197, 198

Lease—*continued.*
by mortgagee, 229
creation of, 195
forfeiture of, 199–201
notice required, 200, 201
mining, 44
mortgagor, power to, 233
surrender by operation of law of, 199
of, 198
tenant for life, power to, 43
termination of, 198
when deed required, 195
writing required, 302
written, when enforced, 196
Lease and Release, after Statute of Uses, 76
at Common Law, 75
Leaseholds,
assignment of, 202
covenants implied in mortgage of, 285, 313, 314
death of tenant of, 208
forms of, 193
husband's rights over, 123
intestate succession to, 93–95
length of title in case of, 262
long term of years, 208–212
mortgages of, 244
sublease of, 204
succession to, 93
Legacy Duty, 296
Legal Estate, passes to personal representative, 80
Length of Title, 261
in case of advowsons, 263
copyholds, 262
freeholds, 261, 262
leaseholds, 262
tithes, 263
Life Estate by implication, 107
how created, 37
Light, prescription as to, 254, 304
Limitation, 246, 310
concealed fraud as affecting, 251
disabilities as to, 248, 249
possession for less than twelve years, 246
remainderman, position of, as to, 249
title of owner destroyed, 246

Limitation—*continued.*
words of, 6, 26
in a will, 104
*Lis Pendens*, 287
Long Terms, 208–212
enlargement of, 212, 319
Lord Paramount, 2 (note *b*)
Lunatics, conveyances by, 119

Maintenance Clause, form of, 337
Manor, meaning of, 13
Mansion House, sale of, 42
Marriage, revocation of will by, 98
Settlement, form of, 331
Married Women,
conveyance by, 122, 123
restraint on anticipation, 124, 126
rights of husband, 122–128
separate property of, 123, 124
trustee, power to convey, 125, 324
will of, 122, 123
Memorandum in writing, form of, 259, 273
Merger, 149
contingent remainder, failure by, 157, 308
Middlesex, registration in, 289
Military Tenure, 17
Mining Lease, 44
Modern Settlement, 34, 35
Mortgagee, death of, 234, 318
one of several, 235
leases by, 229
power of sale of, 227, 228, 317
to appoint receiver, 228, 317
rights of, 225–230
taking possession, 226
Mortgages,
by deposit, 237, 238
clog on the equity, 231
Common Law and equity, 222
consolidation as against other mortgagees, 243
of, 241, 242
contributory, 236
covenants implied in, 285, 313, 314
covenants in, 225, 285
equitable, 237, 238

Mortgages—*continued.*
foreclosure of, 227, 229
form of, 222, 325
of copyholds, 245
form of, 327
of freeholds, form of, 325
of leaseholds, 244
covenants implied in, 313, 314
form of, 328
power of sale in, 227, 228
priorities of, 238
receiver, appointment of, in, 228, 229
Statute of Limitation applies to, 230
tacking, 240
transfer of, 236
Mortgagor, death of, 234
power to lease, 233
Mortmain, 22–25
formerly avoided by means of a use, 61
Mother, inheritance of, 88

Next of kin, who are, 93

"Once a mortgage, always a mortgage," 230, 231
Open Contract, meaning of, 258
proof of title under, 261–267
Outgoings, meaning of, in a lease, 214
Ownership of Land, 20

Particular Estate, meaning of, 5
Particulars, form of, 268
of sale, 267
Partition of joint tenancy, 54
Perpetuities,
as affecting powers of appointment, 166
as to contingent remainders, 154
*Cy Près* doctrine relating to, 138, 139
exceptions to the rule, 137
history of rule against, 135
rule against, 136
Personal Representative, 3
assent to devise by, 82
conveyance to heir by, 82
copyholds do not vest in, 190

Personal Representative—*continued.*
legal estate passes to, 80
power over land, 322
real estate passes to, 80, 81
Petty Sergeanty, 18
Pin Money, form of rent-charge for, 332
Portions Terms, 208, 209
trusts of, 335
Possessory Title, Registration of, 292, 293
Possibility on a Possibility, 157
Power of Appointment, 163–169
appendant, 166
defective exercise of, 169
equitable, 165
exclusive, 164
form of, 335, 336
fraud on, 168
general, 163
exercised by general devise, 106
illusory appointments, 164
Land Transfer Act does apply to general, 82
perpetuities as affecting, 166
special, 163, 164
statutory, 165, 166
Power of Sale of Mortgagee, 227, 228, 316, 317
Prescription,
as to light, 254, 304
as to profits *à prendre*, 253, 304
disabilities as affecting, 255, 256, 305
*in a que estate*, 252
in gross, 252
of easements, 179
reversioner as affected by, 305
Privity of estate and contract, 203
Probate Duty, 296
Probate of Wills of Real Estate, 83
Profits *à prendre*, prescription of, 253, 304
Protector of Settlement, 33
Proviso for cesser, 210
forfeiture, form of, 216
redemption, 326
Purchaser, descent traced from last, 85
meaning of, 7

Qualified Title, Registration of, 292

Quasi entail, 50
Quit rent, 176

Real Estate, meaning of, 5
Representative, 81, 82, 322
Receiver,
appointment of, in mortgage, 228, 229, 317
when the agent of the mortgagor, 229
Recovery, 31, 32
Registered Land, conveyance of, 294
Registration, 287
compulsory, 293
in Middlesex, 289
in Yorkshire, 289
of absolute title, 291, 292
annuities, 288
bankruptcy, 288
cautions, 291
inhibitions, 291
Land Charges, 288
possessory title, 292, 293
qualified title, 292
restrictions, 291
title, compulsory, 290
voluntary, 289
Release as a form of conveyance, 77
of powers, 166
Remainder contingent, 144, 145, 154–157
rules as to, 154
Statute Law as to, 157
vested, 144, 145, 149
Remainderman, position of, as to Limitation, 249
Rent,
breach of covenant to pay, 199, 200
charge, 176
distress for, 148
quit, 176
seck, 176
service, 147, 148, 175
Repairs, liability of tenant for life for, 46
Requisitions on title, 279
form of, 279, 280
time for, 271
Rescission, right of vendor as to, 275
Restraint on anticipation, married women, 124, 125

Restrictions, registration of, 291
Resulting Trust, 71
Use, 70
Reversion, 147
severance of, 207
Reversioner as affected by prescription, 255, 256, 305
Roads, 78

Sale
in Mortgage, power of, 228, 229
of land, contract for, 257
by private contract, 276
Satisfied Terms, assignment of, 309
Scutage, meaning of, 17
Secured Debts, 112
Seignory, meaning of, 13, 173
Seisin, meaning of, 7
Sergeanty, grand, 18
petty, 18
Services avoided by means of a use, 61
due from tenant in fee simple, 14
Settled Chattels, 217
Settlement,
estate duty, 300
form of, 331
modern, 34, 35
Protector of, 33
Settlor, covenants implied by, 314, 315
Severance of joint tenancy, 53
of reversion, 207
Shelley's Case, rule in, 150–153
Shifting Use, 161
Simony, 180
Special Occupant, 49
Specialty Debts, 117, 118
Specific performance of contract to grant a lease, 196
Stamps on documents of title, 265, 274
Statute of Limitation applies to mortgages, 230
Statutory Declaration, 274
Subinfeudation, 12, 13
Sublease, 204
Sub-mortgage, 237
Succession to Leaseholds of half blood, 95
duty, 297
exemptions from, 298, 299

Sufferance, tenancy by, 193
Surrender of Lease, 198
by operation of law of lease, 199

Tacking of mortgages, 240
Tail. *See* Estate Tail.
Tenancy
at Will, 194
by sufferance, 193
in Common, 51
yearly, 194
Tenant for life,
improvements by, 45
power of sale, 42
to cut timber, 46
to exchange, 43
to lease, 43
to mortgage, 48
to sell heirlooms, 47
powers of, under Settled Land Acts, 41
Tenant
in Chief, 2
in *Capite*, 2
in tail after possibility, 36
*pur autre vie*, 48
Tenure, 9, 147
Timber, 46
Tithes, 182
length of title in case of, 263
Title,
abstract of, 260
deeds, 218
good root of, 262, 263
length of, 261
in case of advowsons, 263
copyholds, 262
freeholds, 261, 262
leaseholds, 262
tithes, 263
proof of, 260
requisitions on, 279
Transfer of mortgage, 236, 237
Trustee,
appointment of new, 70
covenants implied by, 315

Trustee—*continued*.
death of, 69
married woman who is a, 125
Trusts,
constructive, 71
creation of, 76
express, 70
implied, 71
resulting, 71
when writing required, 76, 302
Unborn child, gift to child of, 156
Use upon use, 67
Uses, Statute of, 59, 62–65

Vested Remainder, 144, 145, 149
Voluntary Conveyances, 114

Wardship and Marriage, 18
Waste,
equitable, 40
permissive, 40
voluntary, 39
Widow, dower of, 129, 130, 131
right to £500...92
Will, tenancy at, 194
Wills, 96, 97
all my lands, devise of, 104
construction of, 103
death without issue, 106
execution of, 96, 97, 306
form of, 96, 97
general devise, 106
exercising general power, 106
gift over on death without issue, 106
to a witness, 99, 307
implication of life estate, 107
lapse, 100, 101, 102, 307, 308
of married woman, 122
of real estate, probate of, 83
revocation of, 97, 98, 99, 307
words of Limitation in, 38, 104
Words of Limitation, 6, 25, 26
in a deed, 38

Words of Limitation—*continued.*
in a will, 38, 104
"in fee simple," 318
Writ of Præcipe, 30, 56
of Right, 56
Writing, how far necessary for a contract for sale of land, 257, 258

Yearly Tenancy, 194
notice to quit, 194
Yorkshire, registration in, 289

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69

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